No. 2528

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN A. JESSON, E. R. PEOPLES, JAMES W. HILL, RAY BRUMBAUGH, R. C. WOOD and JOHN L. McGINN,

Appellants,

vs.

F. G. NOYES, as Receiver of the Washington-Alaska Bank, a corporation, organized under the Laws of the State of Nevada,

Appellee.

BRIEF OF APPELLANTS.

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FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co.
San Francisco

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STATEMENT OF THE CASE.

"This is an action by the receiver of an insolvent "bank against the various defendants, charging them "with different wrongful and negligent acts and con- "duct, whereby the bank was injured and its assets

" wasted so that it became unable to pay its creditors,
" and asking that an accounting be had and judgments
" rendered against the defendants for such amounts
" as may be found due from them respectively.

"It is alleged that the Fairbanks Banking Company
" was organized as a corporation, under the laws of
" the State of Nevada, on January 21, 1908, and began
" business at Fairbanks on March 15, 1908, and con-
" tinued as such until receivers were appointed to take
" over its assets and wind up its business on January
" 5, 1911, the name of the corporation, however, hav-
" ing been changed to that of Washington-Alaska Bank
" on September 14, 1910. The defendants were officers
" and directors of the corporation during the time it
" was carrying on business, and it is by reason of
" wrongful and negligent acts in their capacity as such
" officers and directors that the plaintiff seeks to hold
" them liable in this action.

"It is charged that the defendants unlawfully began
" to diminish the assets and capital stock of the cor-
" poration, by surrendering to subscribers stock cer-
" tificates which had been issued to them, and paying
" them the amounts of their subscriptions, such sur-
" rendering of stock beginning June 30, 1908, and
" being made at various times until October 25, 1910,
" the total amount of stock thus cancelled and sur-
" rendered amounting to $56,000.00.

"Another charge is that on April 12, 1910, the Di-
" rectors of the Fairbanks Banking Company declared

" a dividend of twenty per cent. upon the outstanding " capital stock, amounting to $33,720.00, and that on " this date the company had no undivided profits or " surplus in excess of its liabilities, but, on the con- " trary, was in an insolvent and failing condition.

"It is alleged that the Receiver has taken charge " of the assets of the company, and so far as possible " reduced them to cash and distributed them among " the creditors, but that he has been able, so far, " to pay them only fifty per cent. of the amounts due " them, and that after exhausting all the remaining " assets and applying them upon the corporation's in- " debtedness, there will still remain a large sum due " to the creditors of the bank.

"The defendants who have appeared by their an- " swers have denied all misconduct and acts of negli- " gence on their part, and have further set up that " after the appointment of a receiver, E. T. Barnette, " and his wife transferred to the receiver a large " amount of property for the purpose of paying all " the obligations of the corporation, and that the same " was accepted by the receiver, under the order of " this Court, in full settlement of any liability on his " part; and that inasmuch as he was at all times a " director with the answering defendants, and jointly " liable with them for any acts of misconduct or negli- " gence, that this transaction operates as a bar to any " suit against them; and further, that the receiver has " received certain sums of money from the property

" thus transferred by Barnette and his wife, and that " the sums so received exceed the sum for which any " answering defendant is liable."

The foregoing language, taken from the opinion of the court, indicates briefly the questions involved on this appeal.

The complaint was voluminous, and as we contend multifarious, but the findings of the court upon most of the questions presented were in favor of the defendants. It found in favor of the plaintiff, however, upon two propositions, first, that the surrender of the stock above referred to was unlawful, and that the directors and officers in office at the time were responsible therefor; and second, that the declaration of the dividend of April 12, 1910, was unlawful, and the directors and officers in office at that time responsible therefor. The court also found against the defendants' contention that the liability of the defendants was discharged by the conveyance of property by Barnette and his wife to the receiver.

The defendants were at various times directors or officers of the bank.

Judgment was rendered against the various defendants as follows:

Against Wood, McGinn, Brumbaugh and Jesson for $33,720.00, by reason of the declaration and payment of the dividend on April 12, 1910.

Against Jesson for $13,400.00 for surrender of shares between July 13, 1908, and September 12, 1908.

Against Jesson and Hill for $1500.00, for surrender of shares between September 13 and October 13, 1908.

Against Jesson, Hill and Peoples for $1100.00, for surrender of shares between October 14, 1908, and March 13, 1909.

Against Jesson, Hill and Brumbaugh for $1000.00, for surrender of shares between March 14 and September 12, 1909.

Against Jesson, Brumbaugh and McGinn for $3000.00, for surrender of shares between September 13, 1909, and October 12, 1909.

Against Jesson, McGinn and Brumbaugh for $1000.00, for surrender of shares between October 13, 1909, and January 18, 1910 (p. 216).

The Washington-Alaska Bank, of which the plaintiff is the receiver, was incorporated under the laws of the State of Nevada on the 21st day of January, 1908, with an authorized capital of $300,000.00, divided into 3000 shares of the par value of $100.00 each. The Bank was originally incorporated under the name of the Fairbanks Banking Company. Subsequently, by amendment to the articles of incorporation, the name was charged to Washington-Alaska Bank (p. 189), and it commenced business in the town of Fairbanks on March 16, 1908, with a subscribed capital of $206,000.00. Part of this was paid for in

cash, part in property, and the balance by the promissory notes of the subscribers (p. 190). Prior to January 21, 1908, subscriptions for the capital stock of the new Bank were circulated, and among other names subscribed thereto were those of E. T. Barnette, 440 shares, R. C. Wood, 220 shares, James W. Hill, 220 shares (the name of Wood being subscribed by the said E. T. Barnette) (p. 190).

Previous to the incorporation of the Bank, Barnette, Hill and Wood, as copartners, had been conducting a banking business in the town of Fairbanks under the firm name and style of Fairbanks Banking Company. On December 12, 1907, the Fairbanks Banking Company, the copartnership, owing to financial difficulties brought about by the panic of that year, was compelled to suspend business and close its doors (p. 190). The capital of the partnership was $200,000.00, which had belonged to Barnette, and the agreement existing between the partners was, that the profits of the partnership were to be divided, one-half to Barnette and one-fourth each to Hill and Wood (p. 191).

In the forepart of January, 1908, a large number of business, professional and mining men of Fairbanks met at that place, for the purpose of organizing a corporation to purchase and take over and absorb the business of the Fairbanks Banking Company, the partnership, and at said meeting negotiations were begun by said proposed incorporators with

said copartnership for the purchase of the same. At that meeting a Committee was also appointed to go into the details of the reorganization of the Fairbanks Banking Company, and report a basis upon which the business should be taken over (p. 191).

The Committee met on the 5th day of January, 1908, and after investigating the affairs of the Bank, made the following report to be presented for consideration by the proposed new corporation:

(a) That the issued stock for the proposed new corporation be as of date February 15, 1908; that notes be taken for all deferred payments; that the same bear interest at the rate of one per cent. per month from February 15, 1908, until paid; that twenty-five per centum of the unpaid for stock be due and payable on or before June 1st, 1908, and that the balance be due and payable on or before July 1st, 1908.

(b) That Captain E. T. Barnette and James W. Hill, with such associates as they may require, prepare a subscription list.

(c) That the amounts subscribed by any person be left to that person, and in case of over-subscription should be reduced proportionately.

(d) That the notes, properties, and securities of the Fairbanks Banking Company, the old institution, examined by its present acting board of trustees, and on which a valuation of $288,000.00 in excess of its liabilities was placed, be accepted.

(e) That all notes, properties and securities which said board of trustees placed in the No. 3

or doubtful class remain the property of the old institution.

(f) That all interest on existing loans as of December 19, 1907, be computed to February 15, 1908, and that the amount of such accrued interest be placed to the credit of the old institution on the books of the new corporation, and that the same be payable on or before December 31, 1908.

(g) That should James W. Hill and R. C. Wood not take the full forty-four thousand dollars in stock in the new corporation, the balance of the amount not so taken to be paid to them not later than July 1st, 1908.

(h) That the proposition of Captain E. T. Barnette to leave on deposit with the new corporation the sum of two hundred thousand dollars, without interest for one year be accepted, and that it be the understanding that such deposit will secure said new corporation against any adverse decision of the Court in the *Caustens* vs. *Barnette* suit in so far as such decision may decrease the value of the Gold Bar Lumber Company property as accepted by the present board of trustees.

(i) That the officers of the new corporation be a president, vice-president, second vice-president, cashier, assistant cashier, treasurer and secretary.

(j) That the number of board of directors be twelve, four to be elected for six months, four for twelve months, and four for eighteen months or until their respective successors are duly elected and qualified.

(k) That dividends be declared semi-annually on June 30, and December 31 (p. 191).

On January 6, 1908, the foregoing report was submitted to the proposed incorporators at a meeting. The report was read, and passed on section by section as read, and on motion duly made and carried was adopted and ordered kept as a part of the record of the meeting. At this meeting the subscription list, set forth in paragraph 3 of the amended complaint (page 4), was presented and signed by the proposed incorporators, setting forth the amount for which each respectively subscribed. At this meeting it was also agreed on behalf of the Fairbanks Banking Company, a copartnership, that the partnership would turn over to the corporation the property of the parnership, on the terms specified in the report; and the proposed incorporators on behalf of said proposed corporation, in consideration thereof, agreed to assume the liabilities of the partnership (p. 194).

On February 8, 1908, a meeting of the subscribers of the capital stock of the Fairbanks Banking Company was held, for the purpose, among others, of obtaining notes of the subscribers for the stock subscribed by them, and at said meeting said stock notes were subscribed by said subscribers of stock and delivered to said corporation (p. 194). At the time of this meeting the articles of incorporation had not yet been received from the State of Nevada, and for the purpose of expediency it was deemed advisable to elect a board of directors and twelve directors were accordingly elected, and it was agreed that they should

act as a board until the arrival of the Articles of Incorporation, when a formal meeting would be held and proper by-laws adopted (p. 194). The Articles of Incorporation did not arrive in Fairbanks until some time in the month of March, 1908. Immediately thereafter a meeting of the stockholders was held, at which by-laws were adopted, a board of directors elected, and a resolution passed to the effect that the matter of taking over the property of the Fairbanks Banking Company, a partnership, be left to the board of directors. At that meeting the subscription list was read and the motion was carried that the proposed offers of subscription be accepted by the corporation, and the persons subscribing declared to be stockholders of the company (p. 235). The defendant Wood was not at the meeting (p. 195). Immediately after the adjournment of the stockholders' meeting, the Board of Directors met, organized and adopted a resolution ratifying the arrangement as to taking over the assets, property, business and liabilities of E. T. Barnette, James W. Hill and R. C. Wood, upon the terms and conditions set forth in the minutes of the subscribers' meeting, held January 5, 1908 (p. 228), except that the resolution providing for the payment of the accrued interest on the partnership notes up to February 15, 1908, was amended so as to read "March 15, 1908."

On the 16th day of March, 1908, a written agreement was entered into between the corporation and

the partners, and on the same day was signed by Barnette and Hill, and also on behalf of the Bank, whereby the valuation of the resources of the partnership was fixed at $790,940.31, and its liabilities at $538,940.31, leaving an excess of $252,000.00 belonging to Barnette, Hill and Wood. In this agreement Barnette, Hill and Wood agreed to accept stock of the corporation at its par value for the amount of assets so in excess of liabilities, except that $200,000.00 thereof should be placed to the credit of Barnette as a special deposit with said corporation (p. 196). The object of this special deposit was to protect the corporation against certain litigation which was then pending, and which affected the Gold Bar stock, one of the assets of the copartnership hereafter referred to (p. 49). By the terms of said agreement the amount of stock to be issued to Barnette, Hill and Wood, was fixed at $52,000.00, thus entitling Barnette to 260 shares and Wood and Hill each to 130 shares.

At the time this agreement was entered into Barnette was President and Director of the corporation, and defendant Jesson also a director (p. 197). The papers for the transfer were left to the Executive Committee and under their direction the written agreement was prepared, submitted to the Board of Directors and approved. According to the by-laws the Executive Committee had the same powers as the board of directors, subject to approval by the board. At the time the written agreement was signed and

executed, and during all the negotiations leading up to the making of it, the defendant Wood was in Seattle, Washington (p. 198). On Wood's return to Fairbanks in April, 1908, he signed the agreement (p. 198).

Of the loans and discounts transferred to the corporation, a large amount was past due and of this amount past due $69,908.94 was at the time of the trial in the hands of the receiver and unpaid. It included two notes of the Tanana Electric Company, aggregating $27,997.38. These last notes depended for their value upon the existence of an alleged guaranty of the Scandinavian-American Bank to make advancements sufficient to cover the same. The board of directors and officers of the Bank accepted said notes of the Tanana Electric Company and paid therefor the sum of $27,997.38 (p. 199).

Among the other assets of the partnership accepted by the officer and directors, was four-fifths (4/5) of the capital stock of the Gold Bar Lumber Company, a corporation existing in the State of Washington, which stock was accepted and paid for at the valuation of $341,949.00. This stock was at all times during the existence of the Bank carried as an asset in that sum (pp. 199, 204).

In order to find that the corporation was not solvent at the time the surrenders of stock were made and the dividend declared, it was necessary for the plaintiff to prove that this past due paper was not worth

its face value. This included establishing that the Tanana Electric Company notes had no value. It was also necessary to prove that the Gold Bar Lumber stock was not worth $341,949.00.

Wood was elected cashier on March 12, 1908. There was a controversy as to when he actually took office, as he did not return to Fairbanks until April, 1908. He continued as cashier until June 30, 1908, at which time Dusenbury was elected to succeed him (p. 200). At that time Wood tendered his resignation and demanded that there be paid to him the amount of his interest in the partnership assets, to wit, $13,000.00. A certificate for 130 shares of the capital stock had been written up in his name, but never detached from the stock book (p. 200). On June 30th a certificate of deposit was issued to him in the sum of $13,000.00, and the shares of capital stock were on the same date charged to treasury stock. Subsequently Wood drew out in cash this sum of $13,000.00 (p. 201).

On March 23, 1908, the accrued interest on the loans transferred to the corporation was computed to March 15, 1908, the amount being $39,642.81, and one-half of this was placed to the credit of Barnette, one-fourth to the credit of Hill and one-fourth to the credit of Wood, and subsequently the same was paid to Barnette, Wood and Hill in cash. At this time the following defendants were officers of the Bank:

Jesson, Hill and Wood (p. 203), Jesson being the only director (p. 22).

On the 14th day of September, 1908, the executive committee passed a resolution to the effect that the corporation would not take over any more stock of the stockholders. This resolution was ratified by the board of directors on the 14th of October, 1908. Notwithstanding this resolution thirty-eight different surrenders of stock were made by stockholders aggregating 43,000 shares, exclusive of Wood's stock, the last alleged surrender being the McGinn stock, of the par value of $10,000.00, for which the sum of $6000.00 in cash was paid, in the manner hereafter described (p. 206).

On November 18, 1908, Strandberg Brothers owning 100 shares, Emma Strandberg 10 shares and B. E. Johnson 10 shares, surrended their stock in part payment of a loan previously made, the directors believing at the time that the loan was precarious (p. 206).

On February 3, 1909, the executive committee again resolved that the officers of the bank be directed to say that "the corporation did not desire to buy in its stock at present." This resolution was ratified by the board of directors on February 13, 1909 (p. 206).

On March 15, 1909, one Parkin and one Tackstrom requested the executive committee of the Bank to buy their stock. The executive committee thereupon again announcd its policy by resolving "it was the sense of "the meeting that the bank observe the rule estab-

"lished at a previous meeting of the board wherein "it was declared not to buy in any more stock." This resolution was approved and ratified by the board of directors on April 12, 1909 (p. 207).

John L. McGinn was the owner of 100 shares of the corporation, and on the 13th day of October, 1910, demanded the right to inspect its books and papers, and threatened that unless this right was granted him immediately, he would make application for an order permitting him to do so and for the appointment of a receiver of said bank. The directors fearing that information obtained by such an investigation would be used by McGinn in promoting the interests of the First National Bank, and if such information was refused and any litigation started, it would possibly start a run of its customers, authorized the cashier to loan a purchaser sufficient funds to purchase the stock of McGinn; one of the directors stating at the time that he had a purchaser who would purchase said stock for the sum of $6000.00, but it would be necessary for him to borrow money to complete said purchase. As the matter was urgent and the purchaser was not available, the cashier purchased the stock in his own name and gave his note to the bank for the amount and paid to McGinn $6000.00 for his 100 shares of the capital stock. On October 25, 1910, the cashier, without the knowledge of any of the directors, canceled his note, charged the amount to the bank, and surrendered the stock (p. 208).

In May, 1909, the Fairbanks Banking Company and the Washington-Alaska Bank of Washington, then doing business in Fairbanks, each purchased one-half of the capital stock of the First National Bank of Fairbanks, Alaska, for which each paid $62,500.00, and continued to own and hold the stock until May, 1910. About May, 1910, the Fairbanks Banking Company sold the entire capital stock of the First National Bank to defendants, Wood and McGinn, for the sum of $125,000.00, and received said amount in payment therefor, delivering to them the capital stock of said First National Bank (p. 211). At the time the banks purchased the First National stock they gave and delivered to R. C. Wood an option to purchase the same on or before June 1, 1910, for the sum of $125,000.00, and the sale to Wood and McGinn was made pursuant to that option (p. 211).

On September 14, 1909, the Fairbanks Banking Company purchased the entire capital stock of the Washington-Alaska Banking Company of Washington, paying therefor the sum of $250,000.00. The capital stock of the bank purchased was of the par value of $150,000.00 (pp. 211, 212).

On April 12, 1910, the Fairbanks Banking Company declared a dividend of twenty per cent. (20%) on its then outstanding capital stock of $168,600, which dividend amounted to $33,720.00, and was paid to the stockholders of said bank either in cash or by

crediting the amount thereof upon notes owing by said stockholders to said bank (p. 214).

On October 1, 1910, the Fairbanks Banking Company and the Washington-Alaska Bank of Washington, combined, at which time the Fairbanks Banking Company took over the assets of the Washington-Alaska Bank of Washington and assumed and agreed to pay its outstanding liabilities. Thereafter the Washington-Alaska Bank of Washington, ceased to exist or do business as a bank, and the Fairbanks Banking Company by amendment to its articles of incorporation, changed its name to the Washington-Alaska Bank of Nevada, and continued thereafter to transact business under said name at Fairbanks, Alaska, until the appointment of a receiver (p. 214).

At the time that the bank failed E. T. Barnette, the President, was away from Fairbanks. He subsequently returned and together with his wife executed two trust deeds conveying to the receivers certain property owned by him in Mexico and in Alaska, upon certain trusts herein referred to. Barnette and his wife presented a petition to the court for an order directing the receiver to accept and hold these properties in trust (p. 939). The court being of the opinion that the matter should originate with the receiver, directed that the papers be turned over to the receivers, there being then two, for their consideration (p. 949).

The receivers subsequently came into court and

asked for instructions, reciting the conveyance of the lands to them, and stating the object to be to secure and ultimately pay the depositors and owners of unpaid drafts of the defendant bank, any balance that may remain, after the property and assets of said bank are collected and applied in payment thereof (p. 950). They then go on to say:

> "We are of the opinion that if these deeds are accepted, it will be impracticable to proceed as contemplated, to fix a liability against E. T. Barnette one of the grantors, in favor of the creditors of said bank, by action in the court here. So far as we now know, the property conveyed to us as trustees, located at Fairbanks, and on the nearby creeks, is all the property owned by said E. T. Barnette in Alaska, that would be subject to seizure on a judgment against him in this court. The deed contains some valuable real estate that is the separate property of Isabelle Barnette" (p. 951).

The Court then made its order directing the receivers to accept the trust deeds (p. 952).

The deed to the Mexican property recited:

> "Whereas the first parties are informed and believe that the second parties, as receivers of the said bank, are about to commence an action in the said court for and on behalf of the creditors of the said Washington-Alaska Bank, against the said E. T. Barnette, one of the first parties, to recover from him the amount of any deficiency that may be ascertained as between the claims of the creditors above mentioned and the amount realized out of the property and assets of the said Washington-Alaska Bank, said action to be based on the lia-

bility of the said E. T. Barnette, to said creditors of the said bank, arising out of his management of the affairs thereof, from March, 1908, up to and including January 5th, 1911, as its president, and one of the directors thereof;

Now, Therefore, in consideration of the premises and of the liability of the said E. T. Barnette to the creditors of the said Washington-Alaska Bank, growing out of his connection and management of the business affairs thereof as its president and one of the directors during the period of the time last mentioned, and for other good and valuable considerations, the said parties of the first part have granted, and do hereby grant and convey to the parties of the second part and their successors in the office of Receiver of the said Bank, in trust, for the uses and purposes hereinafter specified, all their right, title and interest in and to the following described lands and real estate and the appurtenances thereunto belonging, situate in the Municipality and District of Santiago, Ixcuinita, Territory of Tepic, Republic of Mexico, to wit: * *

To Have and to Hold the said lands and tenements in trust and upon the following terms and conditions, that is to say:

That Whereas on or about the 18th day of March, 1908, the Fairbanks Banking Co., a corporation, incorporated under the laws of the State of Nevada and authorized to do a banking business in the City of Fairbanks, Territory of Alaska, commenced to transact a general banking business at said point under their said charter of incorporation, and continuously maintained and operated a bank at said place from the said date until on or about January 5th, 1911; that on or about the 8th day of October, 1910, the name of the said Fairbanks Banking Co. was under and by virtue of the laws of the State of Nevada, duly changed to that of the Washington-Alaska Bank, its present

name, and from that date the business of the said Fairbanks Banking Co. was continued under the name of the Washington-Alaska Bank until its failure as aforesaid; that during all of said period said E. T. Barnette was the president and one of the directors of said Fairbanks Banking Co., and that said Washington-Alaska Bank, and as such was active and influential in the control and management of its business affairs; that on or about the said 5th day of January, 1911, the said Fairbanks Banking Co., now called Washington-Alaska Bank, became insolvent, and receivers were appointed to take charge of the property and assets thereof in the court and cause above mentioned; that it has at all times since appeared, and is now apparent that there is and will be a large deficiency as between the obligations of the said banking institution to its depositors and the owners of unpaid drafts on the one side, and the proceeds of its property and assets on the other; that by reason of all the premises the said E. T. Barnette has heretofore assumed, and does now assume to take upon himself the obligation of paying the depositors and owners of unpaid drafts of the said banking institution, and their representatives, the second parties herein and their successors or successor in the office of receivers or receiver, any deficit that may be hereafter ascertained as between the amounts due to such depositors and owners of unpaid drafts, from the said banking institution on the 5th day of January, 1911, together with 6% per annum interest thereon from said date, and the amount realized out of the property and assets of the said bank and paid to such creditors; that the amount of such deficit is not known at this time, and cannot be ascertained at any particular period of time in the near future that can now be named, but will be so ascertained by or before November 18, 1914" (pp. 1029-1033).

It provided that actual possession was not to be taken until November 18, 1914. The deed to the Alaska property contained similar recitals, but provided for immediate possession of the property by the receivers (p. 1043), and gave them an absolute right of sale on the 18th day of November, 1914, if the creditors of the bank had not been paid in full, either out of the property and assets of the bank as administered by the receivers, or otherwise, or by the said E. T. Barnette. Prior to the last mentioned date a small portion of the property was sold with the consent of the parties to the deed.

The amount collected in money and the value of the properties transferred was more than the amount claimed against any of the defendants. It is claimed by the defendants that this transaction amounted to an accord and satisfaction, and they were entitled to the benefit accordingly.

It is claimed by the plaintiff that the legal effect of the transaction was a covenant not to sue. He thus sets it up in his reply:

> "He alleges that in the institution and prosecution of this suit he is acting under order of court; he admits that the said Barnette was not joined as a party defendant in this action, and he alleges that the reason therefor is that the acceptance of said trust deeds operated as an agreement not to sue said Barnette prior to November 18th, 1914" (p. 186).

There are, then, three principal questions for consideration here:

1. Had the defendants the right to repurchase the stock?

2. Had they the right to declare the dividend?

3. Have they been released?

The points which we propose to make are the following:

1. The complaint is multifarious.

2. The complaint is defective, for the reason that it failed to plead the law of Nevada which it was necessary to prove in order to warrant a recovery against the defendants on account of anything they did in reference to the dividend or purchase of the stock.

3. The purchase of the stock by the corporation was not in violation of the general law.

4. The purchase of the stock was not in violation of the law of Nevada.

5. When a corporation buys shares of its own capital stock, its capital stock is not reduced by that amount, nor is the stock merged.

6. The purchase of the stock was without the knowledge and against the instructions of the directors.

7. The directors are not presumed to have known of the purchase of the stock by the officers.

8. The judgment of the directors was conclusive as to the dividend.

9. The directors were entitled to believe the corporation in possession of a surplus at the time of the declaration of the dividend.

10. The directors were entitled to take the Gold Bar stock at its book value.

11. The directors were entitled to treat the Tanana notes as worth the amount at which the bank carried them.

12. The plaintiff must show that he represents creditors who were such at the time the dividend was declared and the stock purchased.

13. The transaction between Barnette and the receivers constituted an accord and satisfaction.

14. The transfer of assets to the receivers by Barnette, the co-tort-feasor of defendants, was pro tanto a satisfaction of any claim by the receiver against the defendants on account of such joint torts, and the property so transferred being in excess of the amounts found to be due from any of the defendants, they have been thereby completely discharged.

SPECIFICATION OF ERRORS.

The Court erred in overruling the motion of the defendants R. C. Wood, James W. Hill and John L. McGinn to strike from the files and records of this court and out of the case the complaint filed by the plaintiff herein, for the reason that said complaint contained more than one cause of action, and that the same were not separately pleaded.

Assignment of Error No. 1.

The Court erred in overruling the motions of said defendants to strike certain parts and portions of said complaint.

Assignment of Error No. 2.

The Court erred in overruling the demurrers of the defendants to the amended complaint.

Assignment of Error No. 3.

The Court erred in refusing to make the finding of fact set forth in paragraph XIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That the value placed upon said assets of the partnership was the value placed thereon by the stockholders, and that the resolution of the stockholders of March 12, 1908, authorizing the directors to take over such assets, contemplated only the execution of the formal papers necessary for

the purposes of the transfer, and not that the directors should exercise their individual judgment in determining the value of such assets.

Assignment of Error No. 8.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph XXXIII of defendants' proposed findings of fact and conclusions of law, as follows:

That on the 18th day of September, 1908, Oscar Goetz was the owner of ten shares of the outstanding capital stock of said corporation, and upon said date said stock, without the knowledge, consent, approval or acquiescence of said board of directors, and without their fault, and in violation of the resolution hereinbefore in the preceding paragraph set forth, was cancelled by J. A. Jackson, assistant cashier of said bank, and the sum of $1,000 paid to said Goetz out of the funds of said bank, and said stock debited to treasury stock.

Assignment of Error No. 15.

The Court erred in refusing to make finding of fact set forth in paragraph XXIV of defendants' proposed findings of fact and conclusions of law, as follows:

That on the 18th day of September, 1909, the said J. A. Jackson, assistant cashier, without the knowledge, consent, approval, or acquiescence of said board of directors, and without any fault on their part, and in violation of said hereinbefore mentioned resolution of the executive committee, debited treasury stock with the amount of G. A. Vedine's stock $500.

That at said time the said Vedine's name did not appear as a stockholder in the books of said bank, nor had any stock been issued to him, nor had he paid any money for or on account of any stock of said bank; and that no money was paid to said Vedine for or on account of said transaction.

Assignment of Error No. 16.

The Court erred in refusing to make the finding of fact set forth in paragraph XXXV of defendants' proposed findings of fact and conclusions of law, as follows:

That on the 24th day of October, 1908, B. R. Dusenbury, cashier of said bank, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in violation of said hereinbefore mentioned resolution of the executive ocmmittee and board of directors, debited treasury stock on account of McDonnell stock in the sum of $200. That at said time the said McDonnell's name did not appear as a stockholder in any of the books of said corporation, nor had any stock been issued to him, nor had he paid any money whatsoever for or on account of any of the stock of said bank; and that no money was paid to said McDonnell for or on account of said transaction.

Assignment of Error No. 17.

The Court erred in refusing to make the finding of fact set forth in paragraph XXXVII of defendants'

proposed findings of fact and conclusions of law, as follows:

> That upon the 12th day of January, 1909, the said J. A. Jackson, without the knowledge, consent, approval, or acquiescence of the board of directors, and without any fault on their part, and in violation of said hereinbefore mentioned resolutions, debited treasury stock on account of F. E. Johnson's stock in the sum of $200. That at said time the said Johnson's name did not appear as a stockholder in the books of said corporation, nor had any stock been issued to him, nor had he paid any moneys for or on account of any stock of said corporation bank, and no money was paid to said F. E. Johnson for or on account of said transaction.

Assignment of Error No. 18.

The Court erred in refusing to make the finding of fact set forth in paragraph XXXIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That upon the 9th day of February, 1909, John Clifford, was the owner of two shares of the outstanding capital stock of said corporation, and upon said date the said B. R. Dusenbury, cashier of said bank, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in express violation of the resolutions hereinbefore set forth, cancelled said stock, and debited treasury stock with the sum of $200, and said Dusenbury paid the said Clifford out of the funds of said bank the said sum of $200.

Assignment of Error No. 19.

The Court erred in refusing to make the finding of fact set forth in paragraph XLII of defendants' proposed findings of fact and conclusions of law, as follows:

> That upon the 10th day of June, 1909, Hart & McConnell were the owners of ten shares of the outstanding capital stock of said corporation, and upon said date said stock, without the consent, knowledge, approval or acquiescence of the board of directors, and without any fault on their part, and in violation of the resolutions hereinbefore set forth, which were all well known to the officers of said bank, was cancelled by J. A. Jackson, assistant cashier, and the sum of $1000.00 was credited to the deposit account of said Hart & McConnell on the books of said bank, and said stock debited to treasury stock.

Assignment of Error No. 20.

The Court erred in refusing to make the finding of fact set forth in paragraph XLIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That upon the 21st day of August, 1909, Louis and Oscar Enstrom were the owners of ten shares of the outstanding capital stock of said Fairbanks Banking Company, and upon said date the said stock, without the knowledge, consent, approval or acquiescence of the board of directors, and without any fault on their part, and in violation of the resolutions hereinbefore set forth, was cancelled by R. B. Dusenbury, its cashier, and the sum of $1000.00 was placed to the credit of said

Louis and Oscar Enstrom on the books of the bank, and said stock debited to treasury stock.

Assignment of Error No. 21.

The Court erred in refusing to make the finding of fact set forth in paragraph XLIV of defendants' proposed findings of fact and conclusions of law, as follows:

That in the month of May, 1909, H. B. Parkin, who was the owner of ten shares of the outstanding capital stock of said corporation, sold his stock to R. B. Dusenbury, cashier, and the said Dusenbury paid therefor the sum of $1000. That said stock was not transferred on the books of said company to said R. B. Dusenbury, but remained on the books in the name of said H. B. Parkin. That thereafter some officer of said bank, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, made a memorandum note for the sum of $1000.00 on account of the Parkin stock, to which said memorandum note some officer of said bank signed the name of D. Michie; that thereafter, and on the 28th day of October, 1909, J. A. Jackson, then cashier, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in express violation of the resolutions which had theretofore been adopted by said board of directors, of which the said J. A. Jackson had full knowledge, cancelled the said memorandum note, and debited treasury stock with the sum of $1000.00.

Assignment of Error No. 22.

The Court erred in refusing to make the finding of fact set forth in paragraph XLV of defendants' proposed findings of fact and conclusions of law, as follows:

> That upon the 28th day of October, 1909, the said J. A. Jackson, cashier, without the knowledge, consent, approval or acquiescence of the board of directors, and without any fault on their part, and in violation of the said hereinbefore mentioned resolutions of which the said Jackson had full knowledge, debited treasury stock on account of one Alex Cameron with $100.00 and also debited treasury stock $200.00 on account of Edith McCormick, and also debited treasury stock on account of J. W. McCormick, in the sum of $200. That at said time the said Cameron, and the said McCormicks' names did not appear as stockholders in the stock-books of said corporation, nor had any stock been issued to them, nor had they paid any money whatsoever for or on account of any stock of said bank; and that no money was paid to said Cameron or to said McCormicks for or on account of said transaction.

Assignment of Error No. 23.

The Court erred in refusing to make the finding of fact set forth in paragraph XLVI of defendants' proposed findings of fact and conclusions of law, as follows:

> That upon the 10th day of November, 1909, the said J. A. Jackson, cashier, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in violation of said hereinbefore mentioned

resolutions of which the said Jackson had full knowledge, debited treasury stock on account of one Francis H. Taylor, in the sum of $500. That at said time the said Francis H. Taylor's name did not appear as a stockholder in any of the books of said corporation, nor had any stock been issued to him, nor had he paid any money for or on account of any stock of said bank; and that no money was paid to said Taylor for or on account of said transaction.

Assignment of Error No. 24.

The Court erred in refusing to make the finding of fact set forth in paragraph XLVII of defendants' proposed findings of fact and conclusions of law, as follows:

That on the 23rd day of November, 1909, the said J. A. Jackson, cashier, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in violation of the hereinbefore mentioned resolutions, debited treasury stock on account of McGowan & Clark stock in the sum of $500. That at said time the said McGowan & Clark's name did not appear as stockholders in the books of said bank, nor had any stock been issued to them, nor had they paid any money for or on account of any of the stock of said corporation; and that no money was paid to said McGowan & Clark for or on account of said transaction.

Assignment of Error No. 25.

The Court erred in refusing to make the finding of fact set forth in paragraph XLVIII of defendants'

proposed findings of fact and conclusions of law, as follows:

> That upon the 18th day of January, 1910, Horton & Dunham were the owners of five shares of the outstanding capital stock of said corporation, and upon said date said stock, without the knowledge, consent, approval or acquiescence of said board of directors, and without any fault on their part, and in express violation of the resolutions hereinbefore mentioned, was cancelled by J. A. Jackson, cashier, and the same was debited to treasury stock, and the sum of $500 placed to the credit of said Horton & Dunham on the books of said bank. That at said time the said Horton & Dunham were indebted to said Fairbanks Banking Company.

Assignment of Error No. 26.

The Court erred in refusing to make the finding of fact set forth in paragraph LIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That at the time of the taking over of all of the stock hereinbefore mentioned and in the amended complaint mentioned, the assets of said corporation exceeded its liabilities, and the earnings and net profits on hand greatly exceeded the par value of the stock so surrendered, cancelled and returned to the treasury stock of said corporation.

Assignment of Error No. 28.

The Court erred in refusing to make the finding of fact set forth in paragraph LIV of defendants'

proposed findings of fact and conclusions of law, as follows:

> That on the 21st day of September, 1909, the assets of said corporation, not including the interest which had been earned but not paid and which was not carried as an asset, exceeded the liabilities in the sum of $23,032.03.

Assignment of Error No. 29.

The Court erred in refusing to make the finding of fact set forth in paragraph LV of defendants' proposed findings of fact and conclusions of law, as follows:

> That on the 28th day of October, 1909, the assets of said corporation, not including interest which had been earned but not paid and which was not carried as an asset, exceeded its liabilities in the sum of $26,857.68.

Assignment of Error No. 30.

The Court erred in refusing to make the finding of fact set forth in paragraph LVI of defendants' proposed findings of fact and conclusions of law, as follows:

> That on the 10th day of November, 1909, the assets of said corporation, not including interest which had been earned but not paid and which was not carried as an asset, exceeded its liabilities in the sum of $8,896.75.

Assignment of Error No. 31.

The Court erred in refusing to make the finding of fact set forth in paragraph LVII of defendants' proposed findings of fact and conclusions of law as follows:

> That on the 23d day of November, 1909, the assets of said corporation, not including interest which had been earned but not paid and which was not carried as an asset, exceeded its liabilities in the sum of $29,890.74.

Assignment of Error No. 32.

The Court erred in refusing to make the finding of fact set forth in paragraph LVIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That on the 18th day of January, 1910, the assets of said corporation, not including interest which had been earned but not paid and which was not included or carried as an asset, exceeded its liabilities in the sum of $11,984.63.

Assignment of Error No. 33.

The Court erred in refusing to make the finding of fact set forth in paragraph LIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That it has not been shown that the creditors who were existing at the time of the surrender of said stock and the cancellation thereof as hereinbefore set forth have not been paid in full by the Washington-Alaska Bank of Nevada, save and except that on July 1, 1908, were existing cred-

itors, who have not since been paid in full, to the amount of $4,000, and of said sum one-half thereof has since been paid by the receiver.

Assignment of Error No. 34.

The Court erred in refusing to make the finding of fact set forth in paragraph LX of defendants' proposed findings of fact and conclusions of law, as follows:

That at the time of the surrender and cancellation of said stock in the manner hereinbefore set forth, the directors honestly and in good faith believed that they had a right to purchase and take back the stock of said corporation, and were advised by the attorneys of said bank that they had such right.

Assignment of Error No. 35.

The Court erred in refusing to make the finding of fact set forth in paragraph LXI of defendants' proposed findings of fact and conclusions of law, as follows:

That at the time of the surrender and cancellation of said stock in the manner hereinbefore set forth, the directors honestly and in good faith believed, and had a right to believe, that the assets of said bank exceeded its liabilities and there were net profits which greatly exceeded the par value of the stock so surrendered and cancelled.

Assignment of Error No. 36.

The Court erred in refusing to make the finding of fact set forth in paragraph LXII of defendants'

proposed findings of fact and conclusions of law, as follows:

> That all of said stock so debited to treasury stock was thereafter carried as an asset of the corporation, and it was not intended by said transaction to reduce the capital stock of said corporation or to retire the same; but, on the contrary, it was the intention to reissue the same.

Assignment of Error No. 37.

The Court erred in refusing to make the finding of fact set forth in paragraph LXIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That on the 24th day of March, 1909, the Fairbanks Banking Company, in compliance with the laws of the Territory of Alaska, in regard to foreign corporations doing business therein filed and caused to be filed with the clerk of the United States District Court at Fairbanks, Alaska, a statement showing the amount of the outstanding capital stock of said corporation, and said statement upon said date showed that the outstanding capital stock of said corporation was of the par value of $173,600.

Assignment of Error No. 38.

The Court erred in refusing to make the finding of fact set forth in paragraph LXIV of defendants' proposed findings of fact and conclusions of law, as follows:

> That on September 14, 1909, the Fairbanks Banking Company, in compliance with the laws

of the Territory of Alaska in regard to foreign corporations doing business therein, filed and caused to be filed with the clerk of the United States District Court at Fairbanks, Alaska, a statement showing the amount of the outstanding stock of said corporation, and said statement showed that upon said date the outstanding capital stock of said corporation was of the par value of $172,600.

Assignment of Error No. 39.

The Court erred in refusing to make the finding of fact set forth in paragraph LXV of defendants' proposed findings of fact and conclusions of law, as follows:

That on September 10, 1910, the Fairbanks Banking Company, in compliance with the laws of the Territory of Alaska in regard to foreign corporations doing business therein, filed and caused to be filed with the clerk of the United States District Court at Fairbanks, Alaska, a statement showing the amount of the outstanding stock of said corporation, and said statement upon said date showed that the outstanding capital stock of said corporation was of the par value of $169,600.

Assignment of Error No. 40.

The Court erred in refusing to make the finding of fact set forth in paragraph LXVI of defendants' proposed findings of fact and conclusions of law, as follows:

That the end of the fiscal year of the Washington-Alaska Banking Company, was the 31st day of December of each year, and at said time it

had been the custom and practice of said Washington-Alaska Bank and said Fairbanks Banking Company to charge off all debts due said banks that in the judgment of their officers were bad and uncollectible, and which had not been charged off during said fiscal year.

Assignment of Error No. 41.

The Court erred in refusing to make the finding of fact set forth in paragraph LXVIII of defendants' proposed findings of fact and conclusions of law, as follows:

That at the end of the fiscal year of 1909, R. C. Wood, who was then the president and manager of the First National Bank, and also acting as advisory manager of said Washington-Alaska Bank and Fairbanks Banking Company, requested George Wesch, then cashier of the Washington-Alaska Bank, to make a list of the loans and discounts of said bank that he considered bad and uncollectible. That said Wesch thereupon prepared a list of all the said loans and discounts due said bank that he considered bad and uncollectible and presented the same to said R. C. Wood, and thereupon the said Wood and Wesch went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of $8,599.59. That said loans and discounts due said bank were then and there, to wit, on December 31, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were so charged off, there still remained undivided

profits for the fiscal year ending December 31, 1909, amounting to the sum of $56,106.97.

Assignment of Error No. 43.

The Court erred in refusing to make the finding of fact set forth in paragraph LXIX of defendants' proposed findings of fact and conclusions of law, as follows:

That the said George Wesch was and is a man of high standing in this community, a banker of experience, capable and honest, and well acquainted with the securities of said bank and the standing of its debtors.

Assignment of Error No. 44.

The Court erred in refusing to make the finding of fact set forth in paragraph LXX of defendants' proposed findings of fact and conclusions of law, as follows:

That the said R. C. Wood was a man of high standing in the community, the president of the First National Bank, a banker of experience, and well acquainted with the conditions of said Washington-Alaska Bank, and of the securities held by it for loans made by, and due to, said bank.

Assignment of Error No. 45.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXIII of defendants' proposed findings of fact and conclusions of law, as follows:

That at the end of the fiscal year 1909, the said R. C. Wood requested J. A. Jackson, cashier of the

Fairbanks Banking Company, to make out a list of loans and discounts of said Fairbanks Banking Company that he considered bad and uncollectible. That said Jackson thereupon prepared a list of all said loans and discounts due said bank that he considered bad and uncollectible and presented the same to said R. C. Wood, and thereupon the said Wood and Jackson went over said list and arrived at the conclusion that the same included all the loans and discounts due said bank that were then bad and uncollectible, the same amounting to the sum of $24,937.37.

That said loans and discounts due said bank were then and there, to wit, on December 31, 1909, charged off and no longer carried as an asset of said bank; and, after said bad loans and discounts were so charged off, there still remained undivided profits for the fiscal year ending December 31, 1909, amounting to the sum of $9,881.78.

Assignment of Error No. 48.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXIV of defendants' proposed findings of fact and conclusions of law, as follows:

That said J. A. Jackson was and is a man of high standing in the community, a banker of experience, capable and honest, and well acquainted with the securities of said bank, and the standing of its debtors.

Assignment of Error No. 49.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXV of defendants'

proposed findings of fact and conclusions of law, as follows:

> That at the meeting of the board of directors of said Fairbanks Banking Company, held on January 12, 1910, statements of the condition of the said Washington-Alaska Bank of Washington and the Fairbanks Banking Company as of date December 31, 1909, after said bad debts heretofore mentioned had been charged off, were presented by the officers of said bank to said board of directors; and, after the same had been discussed and examined by said directors, the same were ordered filed.
>
> That said statement showed that the undivided profits of the Washington-Alaska Bank for the year ending December 31, 1909, after deducting what the officers of said bank regarded to be all of its bad loans and discounts, was the sum of $56,106.97.
>
> That said statement showed that the undivided profits of the Fairbanks Banking Company for the year ending December 31, 1909, after deducting all the bad debts, was the sum of $9,881.78.

Assignment of Error No. 50.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXVIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That after said sum of $25,000 had been added to said undivided profit account of said Fairbanks Banking Company, the undivided profit account of said bank at said time amounted to the sum of $34,828.55.

Assignment of Error No. 53.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That at the time of the declaration of said dividend, and after the adding of said sum of $25,000 to the undivided profit account, the books of said company showed that the undivided profit account amounted to the sum of $34,828.55, and the directors at said time honestly and in good faith believed that the undivided profit of said Fairbanks Banking Company was the sum of $34,828.25, and said directors were so advised by the officers of said bank.

Assignment of Error No. 54.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXX of defendants' proposed findings of fact and conclusions of law, as follows:

> That the profit of said Washington-Alaska Bank, Fairbanks Banking Company and First National Bank for the year ending December 31, 1909, was the sum of $131,332.91; and, after charging off bad debts on said three banks to the amount of $42,836.96, the net profits of said three banks for said year was $88,495.95.

Assignment of Error No. 55.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXI of defendants'

proposed findings of fact and conclusions of law, as follows:

> That the said Fairbanks Banking Company at the time of the declaration of the dividend was carrying the stock of the Gold Bar Lumber Company for the sum of $341,949, and said directors in good faith believed, and, from the reports of the officers of said Gold Bar Lumber Company, as well as from the reports of people of high standing who were acquainted with said property and the value thereof, had a right to believe that said property was worth said amount.

Assignment of Error No. 56.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXII of defendants' proposed findings of fact and conclusions of law, as follows:

> That the advancements made to the Tanana Electric Company by the Fairbanks Banking Company for which two notes of the Tanana Electric Company were given to said bank amounting to the sum of $27,997.38, were authorized and directed by the Scandinavian-American Bank of Seattle, State of Washington, and the said directors, at the time of the declaration of said dividend, believed and had a right to believe that the same was a good and valid claim against the said Scandinavian-American Bank, and a valuable asset of said Fairbanks Banking Company to the amount that the same was carried by them.

Assignment of Error No. 57.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That said dividend was declared by said directors of said bank in good faith and in the honest belief, and after the exercise of due care, that the undivided profits of said bank amounted to the said sum of $34,828.55, and that the values placed upon the assets of said bank was a true and correct one, and that the amount for which said bank was carrying its assets, and particularly its stocks, loans and discounts, were the true and correct valuation of the same.

Assignment of Error No. 58.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXVI of defendants' proposed findings of fact and conclusions of law, as follows:

> That at the time of the suspension of the Washington-Alaska Bank of Nevada the said E. T. Barnette was not within the Territory of Alaska, but shortly thereafter, and in the month of February, 1911, returned to Fairbanks, Alaska, and entered into negotiations with the creditors and depositors of said bank, for the purpose of amicably adjusting all suits and causes of action that might exist against him on account of any of the matters and things set forth in plaintiff's amended complaint.

Assignment of Error No. 61.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXVII of defendants' proposed findings of fact and conclusions of law, as follows:

> That as a result of said negotiations, and in full satisfaction of all the wrongs complained of in plaintiff's amended complaint, the said E. T. Barnette on the 18th day of March, 1911, executed an instrument in writing in which he admitted his liability to the creditors and depositors of said bank, and promised and agreed to pay all of the depositors of said bank in full not later than the 18th day of November, 1914, together with interest on all amounts due to creditors and depositors from the 4th day of January, 1911, until paid.

Assignment of Error No. 62.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXVIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That Isabelle Barnette was and is the wife of the said E. T. Barnette, and the said Isabelle Barnette was desirous of aiding her said husband in the payment of the creditors and depositors of said Washington-Alaska Bank of Nevada, and to that end joined her said husband in the promise to pay all the depositors and creditors of said Washington-Alaska Bank of Nevada on the terms set forth in the preceding paragraph.

Assignment of Error No. 63.

The Court erred in refusing to make the finding of fact set forth in paragraph LXXXIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That said promise was made upon the distinct understanding that no litigation would be instituted against the said E. T. Barnette, or others for or on account of any of the matters and things set forth in the amended complaint, and for this purpose, and to prevent any litigation, and as security for the faithful performance of the promises made by said E. T. Barnette and Isabelle Barnette, the said Isabelle Barnette and E. T. Barnette on the 18th day of March, 1911, with the knowledge and consent and approval of this Court, conveyed to the receivers of said bank, and the said receivers by order of this Court accepted the conveyance of title to an improved plantation containing 18,723 acres of land, situate in the Republic of Mexico, and certain improved and income producing business properties and lots situate in the incorporated town of Fairbanks, Territory of Alaska, and certain large interests in valuable association placer mining claims situate in the Fairbanks Precinct, Territory of Alaska; all of which properties belonged at the time of said conveyance to said E. T. Barnette and Isabelle Barnette.

Assignment of Error No. 64.

The Court erred in refusing to make the finding of fact set forth in paragraph XC of defendants' proposed findings of fact and conclusions of law, as follows:

> That the property so conveyed by the said E.

T. Barnette and Isabelle Barnette situated in the Republic of Mexico was, at the time of said conveyance, of the value of $500,000.00. That at this time, owing to the unsettled conditions in the Republic of Mexico caused by rebellion and open warfare, it is difficult to determine what is the present value of said property situate in said Republic of Mexico, which said property is of great value, but the market value thereof cannot be determined at this time.

Assignment of Error No. 65.

The Court erred in refusing to make the finding of fact set forth in paragraph XCI of defendants' proposed findings of fact and conclusions of law, as follows:

That the property conveyed by the said E. T. Barnette and Isabelle Barnette in the town of Fairbanks, Territory of Alaska, is of the value of $25,000.

Assignment of Error No. 66.

The Court erred in refusing to make the finding of fact set forth in paragraph XCII of defendants' proposed findings of fact and conclusions of law, as follows:

That the value of the interest of the said E. T. Barnette and Isabelle Barnette in association placer mining claims situate in the Fairbanks Recording District, Territory of Alaska, and conveyed by them to said receivers, is the value of $20,000.

Assignment of Error No. 67.

The Court erred in refusing to make the finding of fact set forth in paragraph XCIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That the receiver has received from said mining properties and said town properties as rents, royalties and proceeds, up to the present time, the sum of $31,400.

Assignment of Error No. 68.

The Court erred in refusing to make the finding of fact set forth in paragraph XCIV of defendants' proposed findings of fact and conclusions of law, as follows:

> That in said deed of said property in the Republic of Mexico it is expressly provided that said receiver may sell all or any part of said land at private sale on or after the 18th day of November, 1914, for the purpose of raising funds with which to pay the claims of the depositors and creditors of said bank then remaining unpaid, and, out of the proceeds thereof, said receiver is directed to pay all the claims of depositors and creditors of said bank then remaining unpaid.

Assignment of Error No. 69.

The Court erred in refusing to make the finding of fact set forth in paragraph XCV of defendants' proposed findings of fact and conclusions of law, as follows:

> That in said deed E. T. Barnette and Isabelle Barnette further authorize and empower said re-

ceiver to collect and receive the amount of $226,025 payable on the 18th day of November, 1914, in case of an option given on the 18th day of November, 1909, for the purchase of forty-nine per cent. of said property situate in the Republic of Mexico, is exercised by the optionees mentioned in said option by that time, and to apply such sum to the payment of said claims of depositors and creditors of said bank.

Assignment of Error No. 70.

The Court erred in refusing to make the finding of fact set forth in paragraph XCVI of defendants' proposed findings of fact and conclusions of law, as follows:

That said deed to property in the Territory of Alaska also provides for and gives said receiver power to collect and receive all the rents, royalties and proceeds of the property therein described, and to sell said property and to apply the amount so received in payment of said claims of depositors and creditors of said bank at any time when it shall be deemed most advisable to do so by the said E. T. Barnette and Isabelle Barnette and the receiver; but that if said property is not so sold by the 18th day of November, 1914, that said receiver is then authorized to sell said property without the consent of said E. T. Barnette and Isabelle Barnette and to apply the amount so received in payment of the claims of the creditors and depositors of said Washington-Alaska Bank of Nevada.

Assignment of Error No. 71.

The Court erred in refusing to make the finding of fact set forth in paragraph XCVII of defendants' proposed findings of fact and conclusions of law, as follows:

> That the said receiver holds a large amount of property belonging to said bank, which is of great value and has not been converted into money; and the property so held by him, and the property so conveyed to the receiver by the said E. T. Barnette and Isabelle Barnette, are more than sufficient to satisfy all the claims, demands and obligations of whatsoever nature now existing against said Washington-Alaska Bank of Nevada.

Assignment of Error No. 72.

The Court erred in refusing to make the finding of fact set forth in paragraph XCVIII of defendants' proposed findings of fact and conclusions of law, as follows:

> That the receiver has received as rents, royalties and profits from the property of the said E. T. Barnette and Isabelle Barnette situate in the Territory of Alaska, the sum of $31,400.00, and that said amount, together with the property conveyed by the said E. T. Barnette and Isabelle Barnette, exclusive of the property situate in said Republic of Mexico, are more than ample to pay all the matters and things charged against these defendants in said amended complaint of plaintiff herein; and that all the wrongs and things charged against these defendants in said amended complaint have, by reason thereof, been fully satisfied and paid.

Assignment of Error No. 73.

The Court erred in refusing to make the finding of fact set forth in paragraph XCIX of defendants' proposed findings of fact and conclusions of law, as follows:

> That the then receivers of the said Washington-Alaska Bank agreed to accept in full satisfaction of all the matters and things set forth in plaintiff's amended complaint and sued on herein, the said promises and property of the said E. T. Barnette and Isabelle Barnette, and the said E. T. Barnette and Isabelle Barnette made and executed said promises and conveyed said property, in full satisfaction of all suits or causes of action then existing against him on account of any and all matters and things arising from his connection with the said Washington-Alaska Bank of Nevada, and in full satisfaction of all the matters and things set forth in plaintiff's amended complaint; and the said receivers accepted and received said promises and said property in full satisfaction of all claims and causes of actions set forth in the amended complaint of the plaintiff herein.

Assignment of Error No. 74.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph IV of defendants' proposed findings of fact and conclusions of law, which is as follows:

> That the stock that was surrendered, and taken back by the directors, and of which said directors had knowledge, was taken honestly and in good faith and under the belief of the said directors

that they had a right to take back said stock, and that the same was for the best interest of the corporation.

Assignment of Error No. 77.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph V of defendants' proposed findings of fact and conclusions of law, which is as follows:

That the balance of the stock so surrendered, and taken back by the officers of said bank, was done without the knowledge, consent, approval or acquiescence of said directors, and there was nothing to charge the said directors with knowledge that its officers were violating the resolutions of the said board of directors not to take back or cancel any stock.

Assignment of Error No. 78.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph VI of defendants' proposed findings of fact and conclusions of law, which is as follows:

That the declaration of the dividend by the directors was done by them honestly and in good faith and under the honest belief that the assets of said corporation exceeded its liabilities in the sum of $34,828.55, and that there was net profits to said amount and that said directors believed at said time that the assets were of the value that said corporation was carrying them.

Assignment of Error No. 79.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph VIII of defendants' proposed findings of fact and conclusions of law, which is as follows:

> That the directors of said bank had a right to rely upon the honesty and fidelity of their officers, and are not chargeable with any acts that said officers did in violation of the instructions of said board of directors.

Assignment of Error No. 80.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph X of defendants' proposed findings of fact and conclusions of law, which is as follows:

> That the plaintiff is not entitled to recover any judgment whatsoever against any of the defendants Jesson, Heill, Wood, Brumbaugh, McGinn, Peoples, Clark, Healey and Preston, or either of them.

Assignment of Error No. 82.

The Court erred in refusing to find as a conclusion of law what is set forth in paragraph XI of defendants' proposed findings of fact and conclusions of law, which is as follows:

> That the defendants are entitled to a decree that the plaintiff recover nothing by this action, and that defendants have judgment for their costs and disbursements.

Assignment of Error No. 83.

The Court erred in overruling the defendants' objections to finding of fact numbered XXIII so made and filed in this cause, and in making the same, which is as follows:

> That of said notes so past due as aforesaid, there were two executed by the Tanana Electric Company in the sum of $27,997.38, which depended for their value upon the existence of an alleged guaranty of the Scandinavian American Bank to make advancements sufficient to cover the same; that said alleged guaranty never had any existence in fact, and the claim therefor had been repudiated by said Scandinavian-American Bank prior to the time said note was accepted by said board of directors, and said repudiation was known to the members of said board. That said notes are still unpaid, and the same was at all times carried on the books of the said Washington-Alaska Bank, formerly Fairbanks Banking Company, as an asset in the sum of $27,997.38.

Assignment of Error No. 93.

The Court erred in overruling the defendants' objections to that portion of paragraph LI of the findings of fact made and filed in said cause, and in making the same, which is as follows:

> That said bank had no surplus or undivided profits against which the same could be charged.

Assignment of Error No. 102.

The Court erred in overruling the defendants' objections to paragraph LII of the findings of fact so

made and filed in said cause, and in making the same, which is as follows:

> That the taking back of said stock and the payment therefor as aforesaid was illegal, wrongful and in violation of the laws of the State of Nevada under which said corporation was organized.

Assignment of Error No. 103.

The Court erred in overruling the defendants' objections to findings of fact numbered LIV so made and filed in this cause, and in making the same, which is as follows:

> That said stock surrenders so made as aforesaid were acquiesced in by said directors, and in some instances were made under their directions and with their express approval.

Assignment of Error No. 104.

The Court erred in overruling the defendants' objections to finding of fact numbered LXI so made and filed in this cause, and in making the same, which is as follows:

> That at the time said dividend was so declared and paid, the Fairbanks Banking Company did not have any surplus or undivided profits out of which the same could be declared and paid.

Assignment of Error No. 107.

The Court erred in overruling the defendants' objections to findings of fact numbered LXII so made

and filed in this cause, and in making the same, which is as follows:

> That said dividend was declared and paid in violation of the laws of the State of Nevada, and also in violation of the by-laws of the said Fairbanks Banking Company, and was wrongful and illegal.

Assignment of Error No. 108.

The Court erred in overruling the defendants' objections to findings of fact numbered LXVI so made and filed in this cause, and in making the same, which is as follows:

> That the assets of the said bank now in the hands of the receiver are insufficient to pay its liabilities, and the amount of such liabilities is more than $470,000 in excess of the value of said assets.

Assignment of Error No. 109.

The Court erred in overruling the defendants' objections to conclusion of law numbered I of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That the defendants Wood, McGinn, Brumbaugh and Jesson are jointly and severally liable in the sum of $33,720.00 by reason of the declaration and payment of the dividend upon the capital stock of the Fairbanks Banking Company on April 12, 1910.

Assignment of Error No. 110.

The Court erred in overruling the defendants' objections to conclusion of law numbered 2 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That the defendant Jesson is liable in the sum of $13,400.00 by reason of the surrender of shares of capital stock of said company, made between July 13, 1908, and September 12, 1908.

Assignment of Error No. 111.

The Court erred in overruling the defendants' objections to conclusion of law numbered 3 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That the defendants Jesson and Hill are jointly and severally liable in the sum of $1,500.00 for surrender of shares of capital stock of said company made between September 13, 1908, and October 13, 1908.

Assignment of Error No. 112.

The Court erred in overruling the defendants' objections to conclusion of law numbered 4 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That the defendants Jesson, Hill and Peoples are jointly and severally liable in the sum of $1,100.00 for surrenders of shares of capital stock, made between October 14, 1908, and March 13, 1909.

Assignment of Error No. 113.

The Court erred in overruling the defendants' objections to conclusion of law numbered 5 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That the defendants Jesson, Hill and Brumbaugh are jointly and severally liable in the sum of $1,000.00 for surrenders of capital stock of said company made between March 14, 1909, and September 12, 1909.

Assignment of Error No. 114.

The Court erred in overruling the defendants' objections to conclusion of law numbered 6 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That defendants Jesson, Brumbaugh and McGinn are jointly and severally liable in the sum of $3,000.00 for surrenders of capital stock of said company, made between September 13, 1909, and October 12, 1909.

Assignment of Error No. 115.

The Court erred in overruling the defendants' objections to conclusion of law numbered 7 of the conclusions of law signed and filed in this cause, and in making the same, which is as follows:

> That defendants Jesson, McGinn and Brumbaugh are jointly and severally liable in the sum of $1,000.00 for surrenders of capital stock made between October 13, 1909, and January 18, 1910.

Assignment of Error No. 116.

The Court erred in making a conclusion of law as set forth in paragraph 8 of the conclusions of law signed and filed in this cause, which is as follows:

> That the plaintiff is entitled to a decree and judgment against the above-named defendants for the recovery of the sums above mentioned.

Assignment of Error No. 117.

The Court erred in making and entering judgment and decree in favor of the plaintiff and against the defendants R. C. Wood, John L. McGinn, Ray Brumbaugh and J. A. Jesson, jointly and severally for the sum of $33,720.00 by reason of the declaration and payment on April 12, 1910, of the dividend upon the capital stock of the Fairbanks Banking Company, set up in the complaint.

Assignment of Error No. 118.

The Court erred in rendering and entering a judgment and decree in favor of the plaintiff and against the defendant J. A. Jesson for the sum of $13,400 by reason of the surrender of shares of the capital stock of said company made between July 13, 1908, and September 12, 1908.

Assignment of Error No. 119.

The Court erred in making and rendering and entering a judgment and decree in favor of the plaintiff and against the defendants J. A. Jesson and James W. Hill, jointly and severally, for the sum of

$1,500.00 by reason of the surrender of shares of the capital stock of said company made between September 13, 1908, and October 13, 1908.

Assignment of Error No. 120.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants James W. Hill and J. A. Jesson and E. R. Peoples, jointly and severally for the sum of $1,100.00 by reason of the surrender of shares of the capital stock of said company made between October 13, 1908, and March 13, 1909.

Assignment of Error No. 121.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants J. A. Jesson, James W. Hill and Ray Brumbaugh, jointly and severally, for the sum of $1,000.00 by reason of the surrender of shares of the capital stock of said company made between March 14, 1909, and September 12, 1909.

Assignment of Error No. 122.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants J. A. Jesson, Ray Brumbaugh and John L. McGinn, jointly and severally, for the sum of $3,000.00 by reason of the surrender of shares of capital stock of said company made between September 13, 1909, and October 12, 1909.

Assignment of Error No. 123.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants John A. Jesson, John L. McGinn and Ray Brumbaugh, jointly and severally, for the sum of $1,000.00 by reason of the surrender of shares of the capital stock of said company, made between October 13, 1909, and January 18, 1910.

Assignment of Error No. 124.

The Court erred in making, rendering and entering a judgment and decree in favor of the plaintiff and against the defendants R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh, and James W. Hill, to the effect that plaintiff recover the costs of and from said defendants.

Assignment of Error No. 125.

The Court erred in making, rendering and entering a decree to the effect that execution issue for the enforcement of the above judgments and decrees against the defendants R. C. Wood, E. R. Peoples, John L. McGinn, J. A. Jesson, Ray Brumbaugh and James W. Hill.

Assignment of Error No. 126.

The Court erred in not making, rendering and entering a decree in favor of defendants and against the plaintiff to the effect that the plaintiff take nothing in this action, and that the defendants recover their costs and disbursements.

Assignment of Error No. 127.

The Court erred in refusing to make a finding that all the matters and things charged in the complaint were fully compromised and settled by the accord and satisfaction that was entered into between E. T. Barnette and Isabelle Barnette, and the former receivers of said corporation.

Assignment of Error No. 128.

The Court erred in finding that the defendants Wood, Brumbaugh, J. A. Jesson and McGinn, as directors, were liable for the declaration of the dividend of the 12th day of April, 1910.

Assignment of Error No. 129.

The Court erred in finding that these defendants were liable for the stock taken back by said corporation, as set forth in the findings of fact.

Assignment of Error No. 130.

The Court erred in failing to make a finding of fact to the effect that all the wrongs charged in the complaint have been fully paid and satisfied by the said E. T. Barnette and Isabelle Barnette.

Assignment of Error No. 131.

The Court erred in failing to make a finding of fact to the effect that all the matters and things found against these defendants have been fully satisfied and paid by the said E. T. Barnette and Isabelle Barnette.

Assignment of Error No. 132.

ARGUMENT.

I.

THE COMPLAINT IS MULTIFARIOUS.

The complaint was attacked by motion to strike it from the files and by motion to strike out certain portions of the complaint. Assignments Nos. 1 and 2 (Tp. 54 *et seq.*).

A bill seeking to hold several directors of a bank liable for losses caused by unlawful loans and dividends extending over a series of years, during some of which a portion of the defendants were not members of the board of directors, and were in no way responsible for the losses, is multifarious.

The case of *Emerson* v. *Gaither,* 103 Md., 504, 8 L. R. A. (N. S.), 745, is on all fours with the case at bar. The Court said in that case:

> "There is, perhaps, more confusion, real or apparent, in the authorities on the subject of multifariousness than any other connected with equity procedure. This is in part owing to the fact that there is no rule on the subject of universal application, and much is left to the discretion of the court, to be determined by the facts of each particular case. The tendency of the courts has been to overrule the objection; but when a chancellor can see that a bill undertakes to burden one or more defendants with matter with which they are not connected, and not responsible, or that the bill is liable to create confusion by reason of the joinder of improper parties who have no privity with

each other, or because several distinct matters have been blended, which have no connection with each other, he is at least called upon to give it a most careful scrutiny. There is no occasion to go outside of this record to give illustrations of what we have in mind. The defendants named in this bill are sixteen persons who at some time had been directors of this bank, and the executors and the distributees of another person who had in his lifetime been a director. It states the times during which the different persons were directors, but as it is alleged that on January 1, 1898, the bank was solvent, and only complains of what was done after that time, it is not necessary to go back of that date. It charges that Messrs. Horner, Bauernschmidt, Hartman, Woolford, and McPhail were directors from January 1, 1898, to December 22, 1900; Mr. Brinton to May 3, 1898; Mr. Walpert to September 29, 1898; Messrs. Ellis and Dickey to November 20. 1898; Mr. Emerson to March 20, 1899; Mr. Malster to January 19, 1900; and that the following served to December 22, 1900, from the dates named, to wit: Mr. Thompson to August 5, 1898, Mr. Harden from October 14, 1898, Messrs. Abercrombie and Hertel from January 12, 1899, and Messrs. McDevitt and Marts from January 12, 1900. * * *"

"Messrs. Ellis and Dickey, who retired on November 29, 1898, could only have been connected with three transactions amounting of a little over $17,000. and Mr. Emerson with only four of the loans, amounting to something less than $22,000, and the one dividend of December 30, 1898; and it is impossible to tell from the bill that all of those loans were not repaid before the bank failed. Paragraph six names the directors that are charged with declaring the dividends unlawful, and neither Brinton, Walpert, Ellis, Dickey, McDevitt, nor

Marts is alleged to have taken any part in them, and they could not have done so, as they were not directors at either of the times named. Yet they are made defendants to a bill in which the declaration of dividends is made a separate and distinct charge, and it is easy to see what the investigation of that charge would involve. It necessarily means that the financial condition of the bank at those periods must be inquired into and determined, and that may involve tedious and expensive accountings of experts, and taking much testimony. So with the numerous loans charged to have been unlawfully made by the officers, by reason of the negligence of the directors in the discharge of their duties. Some of those items may require a large mass of testimony to be taken in order to ascertain the circumstances under which the loans were made, whether they were repaid, what directors knew or ought to have known of them, whether any of the directors of later dates were negligent in not requiring them to be paid, or not securing them, etc. Are all of the defendants to be thus subjected to inconvenience, loss of time, fees of counsel, and possibly expert accountants, court costs incurred concerning matters in which they are not connected, simply because at some time they happened to be directors of the same bank? It would be very difficult if not impossible, for the court to accurately apportion the costs. There is not a 'common liability' within the meaning of that expression as used in *Fiery* v. *Emmert,* 36 Md., 464, when one director of a corporation is liable for one act, and others are liable for twenty or more separate and distinct acts, although of the same general character. * * * And so as to Messrs. Emerson, Walpert, and others who are only alleged to have been connected with a few of the transactions complained of. It certainly cannot be allowed merely because it may re-

quire two or three more suits than would be necessary if all were joined in one. A multiplicity of suits, although to be avoided when it can reasonably be done, is far preferable to one suit which, by reason of the joinder of different matters, is likely to work injustice. * * * We are of the opinion that the demurrers should have been sustained."

Alaska has a special statute regulating joinder of causes of action of an equitable nature which reads as follows:

Sec. 1201. The plaintiff in an action of an *equitable* nature may unite several causes of action in the same complaint, where they all arise out of—

First. *The same transaction, or transactions connected with the same subject of action;*

Second. Contract, express or implied; or,

Third. Injuries, with or without force, to property;

Fourth. Claims to real property or any interest therein, with or without an account for the rents and profits thereof;

Fifth. Claims to personal property, or any interest therein, with or without an account for the use thereof;

Sixth. Claims against a trustee by virtue of a contract or by operation of law.

But the causes of action so united must all belong to one of these classes, and *must affect all the parties to the action,* and not require different places of trial, and *shall be separately stated.*

Compiled Laws Ty. of Alaska (1913), C. C. P.; *Carter Code,* Sec. 369.

The complaint in this action violates the statute in three particulars:

1. The causes of action do not all arise out of the same transaction, nor are they connected with the same subject of action.

They embrace transactions occurring at various times over a period of three years. The transactions complained of were of various kinds: the purchase of the original assets, overvaluation, improper credit of interest, illegal purchase of stock.

2. They do not affect all the parties to the action.

3. They are not separately stated.

The proper method of attack is by motion to strike out the pleading:

> Sec. 905. * * * A motion to strike out a pleading for want of verification or subscription, or *because several causes of action or defense therein are not pleaded separately,* or for other cause, or a sham, frivolous, or irrelevant pleading or redundant matter therein, shall be made within the time for answering such pleading.
>
> *Compiled Laws Ty. of Alaska* (1913), Code of Civ. Proc.

This course was adopted in this case (p. 54).

The peculiar disadvantage of this *omnium gatherum* method of pleading, in the case at bar, will be apparent when we come to consider the following:

The defendant McGinn was a member of the Board of Directors from the 14th day of September, 1909, until about the first of May, 1910. During this time he is charged with certain acts of wrongdoing which the Court found consisted of acquiescing in the surrender of stock and the declaration of a dividend. Yet McGinn as attorney for the bank is charged with wrongfully and unlawfully taking over the Gold Bar Lumber Company stock at a grossly fraudulent over-valuation; with taking over loans and discounts that had no value; with permitting the copartners to be credited with accrued interest to the amount of over $39,000.00; with allowing Wood to dispose of his stock for $13,000.00, and other acts for all of which, if wrong, only the directors could be held responsible for. No conspiracy is charged between McGinn and the Board of Directors. The allegation of the complaint as to all acts charged against the defendants (except when McGinn was a director) is to the effect that "all was done and accomplished with the full "knowledge, co-operation and consent of all of the "defendants" (naming the Board of Directors and other officers) "and of the defendant John L. Mc-"Ginn, who was then and there attorney and legal "adviser both of said copartnership and said cor-"poration Fairbank Banking Company and who after-"wards became a director and vice-president of said "corporation" (p. 9).

Suppose all this were true and that McGinn had

full knowledge of the alleged fraudulent acts, in his capacity as legal adviser of the Bank, could he be held responsible? Under the Nevada laws under which the plaintiff is seeking to charge the defendants, only the trustees or directors under whose administration the wrong was done could be held responsible. Under that law all the directors "except those who may cause "their dissent to be entered at large on the minutes "shall in their individual and private capacities be "jointly and severally liable to the corporation" (pp. 391-2).

Suppose McGinn as legal adviser to the Board of Directors had opposed their action. Had he any right to cause his "dissent thereto to be entered at large on the minutes"? Is a legal adviser to be held as responsible as a director for acts over which he has no control and has no vote in? Likewise are Wood as cashier and Hill as vice-president, neither being member of the directory, also to be held liable?

We have made this illustration to bring prominently before the Court the injustice of permitting a multifarious complaint. The defendants under Section 96 of Alaska Code moved to strike the amended complaint "from the files of the case" for the reason that more than one cause of action has been attempted to be pleaded in said amended complaint without stating each cause of action separately as prescribed by Section 96 of Part IV, Carter's Annotated Code of Alaska, and also to strike "out from this case the

" amended complaint herein upon the ground that " said amended complaint contains a large number of " alleged causes of actions, and in no case does any one " of the alleged causes of action affect all the parties " defendant, and said several causes of action are not " stated or pleaded separately, and do not belong to " the same class" (pp. 54, 55, 56, 57).

Federal cases may be cited to the effect that such a pleading is permissible. These cases are under the general equity practice not governed by any statutory law. But the Laws of Alaska, Section 1201 (*supra*) provide that in equity cases various causes of action may be set forth in one complaint, but the separate causes of action must be separately stated.

Section 1201 above quoted is a positive law of Congress as to how separate causes of action in equity cases may be pleaded in Alaska. Evidently Congress had in mind at the time of its passage the injustice under the prevailing Federal practice of such pleading as the one illustrated in *Emerson on Gaither* (*supra*), where all of the defendants are subjected to inconveniences, loss of time, fees of counsel and possibly expert accounting and court cost concerning matters with which they are not connected, simply because at some time they happened to be directors of the same Bank.

To bring the matter pointedly before the Court we will again show the position of the defendant McGinn. The Court held him liable on two charges of the complaint (1) that "the taking back of said stock and the

" payment therefor as aforesaid was illegal, wrongful " and in violation of the laws of the State of Nevada " under which said corporation was organized" (Finding 52, page 209); and (2) "that said dividend was " declared and paid in violation of the laws of the " State of Nevada and also in violation of the by-laws " of said Fairbanks Banking Company, and was " wrongful and illegal" (p. 214).

Under the general law a corporation has a right to purchase its own stock. The cases in support of this proposition will be hereinafter cited. If this cause of action as to McGinn and the other defendants had been separately pleaded, they could have demurred to the same on the grounds that said separate cause of action did not state facts sufficient to constitute a cause of action and the Court must have sustained the same. If it had been intimated in the complaint that it was not under the general law but under a special statutory law of the State of Nevada that it was sought to charge the defendants, then a motion would have been made to require the plaintiff to set forth such a law. The same is true as to the dividend. The complaint, however, as to the dividend charges a common law liability, but the finding of the Court is simply "That " said dividend was declared and paid in violation of " the laws of the State of Nevada. * * *" (p. 214).

Had the motion of the defendants to strike out the complaint been granted, the plaintiff would have had to set out each cause of action separately. It then

would have been apparent that McGinn was joined as a defendant in respect to several causes of action with which he had nothing to do. He could have forced either a dismissal of himself from the case or a dismissal of these causes from this action, and in either event would have escaped the burden and expense of a long trial involving many transactions to which he was legally a stranger.

The same applies to all the other defendants except Jesson, who was a director through the entire period covered.

II.

THE COMPLAINT IS DEFECTIVE, FOR THE REASON THAT IT FAILED TO PLEAD THE LAW OF NEVADA, WHICH IT WAS NECESSARY TO PROVE IN ORDER TO WARRANT A RECOVERY AGAINST THE DEFENDANTS ON ACCOUNT OF ANYTHING THEY DID IN REFERENCE TO THE DIVIDEND OR PURCHASE OF THE STOCK.

The Court rendered judgment in favor of the plaintiff on two propositions—the purchase of the stock, and the declaration of the dividend. It was claimed that both of these were in violation of the law of the State of Nevada, under which the plaintiff's bank was incorporated.

It was an essential element of plaintiff's case to establish the Nevada law. He sought to do this by offering in evidence certain fragments of the Ne-

vada Statute (p. 391). But nowhere did he plead it and *nowhere did the Court find it as a fact.*

The only findings on this subject were:

> That the taking back of said stock and the payment therefor as aforesaid was illegal, wrongful, and in violation of the laws of the State of Nevada under which said corporation was organized (p. 209). Assignment No. 103.

> That said dividend was declared and paid in violation of the laws of the State of Nevada, and also in violation of the By-Laws of the said Fairbanks Banking Company, and was wrongful and illegal (p. 214). Assignment No. 108.

These findings are of course insufficient, being mere conclusions of law. It was necessary to find what the law of Nevada was, and as a predicate for such a finding, it was necessary to allege the matter in the complaint.

In order to hold these defendants under the circumstances of this case, it was incumbent upon the receiver to show *what statute* of Nevada they were violating when they did the acts complained of, for if there were no statute bearing upon the subject, then the presumption would arise in favor of the regularity of their action. It would moreover be necessary to show that they were animated by motives of fraud. The general doctrine in vogue throughout the United States would be applicable, that in the absence of statutory prohibition, a corporation has the right to

purchase its own stock, even though the effect thereof is thereby to diminish its capital.

The appellants attack this phase of the complaint in various ways. They demur to the complaint as a whole for failure to state facts sufficient to constitute a cause of action; they move to strike out separate portions of the complaint; they move to require causes of action to be separately stated. Assignments Nos. 1, 2 and 3).

The rule that the courts of one country cannot take cognizance of the law of another without *plea and proof* has been constantly maintained at law and in equity, in England and America.

Liverpool and Great Western Steam Co. v. *Phenix Ins. Co.,* 129 U. S., 793;
Church v. *Hubbart,* 6 U. S., 2 Cranch., 187, 236 (2: 249);
Ennis v. *Smith,* 55 U. S., 14 How., 400, 426, 427 (14: 472);
Dainese v. *Hale,* 91 U. S., 13, 20, 21 (23: 190, 193);
Pierce v. *Indseth,* 106 U. S., 546 (27: 254);
Ex parte Gridland, 3 Ves. & B., 94, 99;
Lloyd v. *Guibert,* L. R., 1 Q. B., 115, 129; S. C., 6, Best & S., 100, 142;
Wickersham v. *Johnston,* 104 Cal., 407.

Where a party seeks either to recover or defend under a foreign law, such law must be pleaded and

proved like any other fact, since the Court cannot, ex-officio, take notice of the laws of a foreign State. *Encyc. Pleading and Practice,* Vol. 9, p. 542.

Norris v. *Harris,* 15 Cal., 254.

In *Monroe* v. *Douglass,* 5 N. Y., 451, the Court said:

> "Although the respondent, in his answer, has made frequent reference to the laws of Scotland, and alleged that by them he acquired a right to the real estate in question, yet neither he nor the appellants have *set forth or claimed in their pleadings,* or proved, that the laws of Scotland are different from our own, in regard to the construction and legal effect of the testamentary settlement; nor have they *averred* or proved the existence, in that country, of any rule or principle of law, written or unwritten, relating to that subject, which, on comparison, appears different from our own. It is a well-settled rule, founded on reason and authority, that the *lex fori,* or, in other words, the laws of the country to whose courts a party appeals for redress, furnish, in all cases, *prima facie,* the rule of decision; and if either party wishes the benefit of a different rule or law, as, for instance, the *lex domicilii, lex contractus,* or *lex loci rei sitae, he must aver and prove it.* The courts of a country are presumed to be acquainted only with their own laws; those of other countries are to be *averred and proved,* like other facts of which courts do not take judicial notice; and the mode of proving them, whether they be written or unwritten, has been long established."

In *Holmes* v. *Broughton,* 10 Wend (N. Y.), 75, 25 Am. Dic., 536, it was held that a plea of former recovery in another State, and satisfaction of the judgment by a proceeding unknown to the common law, but alleged to be authorized by the statute of such State, should set out the statute, that the Court may see how such proceedings constitute a bar to the plaintiff's action.

The Court said:

> "The question is, whether the proceedings alleged to have been had in the State of Vermont are well pleaded? It is laid down by Mr. Chitty that the courts do not *ex officio* take notice of foreign laws, and *consequently they must in general be stated in pleading*: 1 Chit., Pl. 221. The question arose in *Collett* v. *Keith,* 2 East, 261, which was an action of trespass for seizing and taking a ship at the Cape of Good Hope, to wit, etc. The defendant, among other things, pleaded, that the settlement of the Cape of Good Hope was subject to foreign, to wit, Dutch laws; that the ship was within the jurisdiction of the supreme court there, and that certain proceedings were instituted and had; that the defendant, according to the foreign laws of the place, the said court having competent jurisdiction, was authorized and ordered to take and detain the ship. To this plea there was a demurrer. In deciding the case, Grose, J., said, that the plea was too general; that it was not enough to state that the vessel was within the jurisdiction of the court which was governed by foreign laws, and that certain proceedings were instituted; but the defendant should have shown what the foreign law was which gave jurisdiction to the court.

"In the case of *Walker* v. *Maxwell,* 1 Mass., 103, it was held that a defendant who relies upon the statute of another state, must, *in his plea,* set out the statute, that the court may see whether the proceedings were warranted by the statute or not, and the general allegation that the proceedings were pursuant to the statute is not sufficient. That was an action on a promissory note, so called in the declaration, by which Lyon and Maxwell promised the plaintiffs, by the name of James Chase & Co. to pay them thirty-five dozen wool cards on a certain day. Maxwell defended and pleaded that an action was brought by one Cole, in the common pleas of Bristol county, in the state of Rhode Island, against Chase, one of the plaintiffs in this action, upon a certain note which is set forth, of which Cole was indorsee, and that Cole, pursuant to the statute of the state of Rhode Island in such case made and provided, directed the sheriff to serve the original writ upon the defendants, Lyon and Maxwell, for the purpose of attaching the personal estate of Chase in their hands; that in pursuance of the statute aforesaid, service was so made; that Lyon and Maxwell pursuant to the statute aforesaid, appeared and submitted to examination, etc.; that judgment was rendered in favor of Cole against Chase, as appears by the record; and further, that Cole prosecuted an action in the said court, in pursuance of the statute aforesaid, against the defendants, Lyon and Maxwell, upon the note now declared on, and set forth proceedings against Chase, and judgment; whereby Lyon and Maxwell became liable to pay the value of the wool cards attached as aforesaid, etc., stating a judgment in favor of Cole against Lyon and Maxwell for the amount, etc. To this plea the plaintiff demurred, and assigned several causes of demurrer, one of which is, that it does not appear by the plea what the said statute or law is, which is mentioned as a

statute in said plea, nor by what law or authority the court of common pleas in Bristol county in Rhode Island, gave the judgment described in the plea. The whole court were of opinion that the plea was bad for the cause assigned; they said that *the plea should have set set forth the statute of Rhode Island,* that the court might see whether the proceedings stated in the plea were authorized. That the common law might be considered common to both states, and regulating the proceeding of courts of justice in both; but the proceedings stated in the plea being of a peculiar kind, and so different from the common law, the statute ought to be shown to them, and the general allegation, that the proceedings were pursuant to the statute of Rhode Island, was not sufficient.

"The case of *Pearsall* v. *Dwight,* 2 Mass., 84 (3 Am. Dec., 35), shows what is considered sufficient in that state. There the defendant pleaded the statute of limitations of the state of New York; the part of the statute upon which he relied was pleaded wih a profert of the exemplification of the whole statute, with necessary averments, and it was held by Parsons, C. J., that, nothwithstanding the profert of the exemplification of the statute, *the court could not take notice of any part of the statute not shown in the plea;* that if the opposite party relied on any part of the same statute, he should have prayed over and spread the whole statute upon the record. Again, in the case of *Legg* v. *Legg,* 8 Mass., 99, the same court declare that they could not judicially take notice of the laws of Vermont, and that upon the point there stated. which was a common law question, they must presume the laws of Vermont to be similar to their own. The doctrine of this highly respectable court seems to me to be sound, and if so, the plea in this case is defective in not setting forth the statute of Vermont, if any, authorizing the proceedings stated

to have taken place, that the court may see how those proceedings constitute a bar to the plaintiff's action. This court cannot take judicial cognizance of any of the laws of our sister states at variance with the common law. The proceedings stated are not common law proceedings, and the authority for them must be specially set forth."

Thomas v. *Pendleton,* 1 S. Dak., 150, 36 Am. St. Rep. 727, was an action founded upon an alleged judgment in the court of common pleas of Crawford county, in the State of Pennsylvania.

The complaint set out the note and warrant of attorney upon which the alleged judgment was founded. In the complaint the judgment was alleged to have been rendered on the eighth day of May, 1889, upon a note bearing date March 12, 1889, payable ninety days after its date. It therefore appeared upon the face of the complaint that the alleged judgment was rendered more than thirty days before the note, by its terms, became due and payable. The court said:

"No law of the state of Pennsylvania *is set out or pleaded* authorizing a judgment to be entered upon a note before its maturity. In the absence of any allegation as to what the laws of Pennsylvania are on this subject, the court will presume they are the same as our own."

In *Meuer* v. *Chicago, Etc. Ry Co.*, 5 S Dak., 568, 49 A. S. R., 900, the Court said:

> "The contract in this case, having been made in Wisconsin, may be regarded as a contract of that state, and to be interpreted in accordance with the laws of state: *Liverpool, etc., Co.* v. *Phenix Ins. Co.*, 129 U. S., 397; *Hazel* v. *Chicago, etc. Railroad Co.*, 82 Iowa, 477. This court, however, will not take judicial notice of the laws of another state. Such laws must be *alleged* and proven on the trial, the same as any other facts in the case. No such evidence appears from the record in the case to have been given. In the absence of such evidence, this court will presume that the law of Wisconsin as to the right of a common carrier to limit the liability of himself or servants is the same as the law of this state upon that subject."

III.

THE PURCHASE OF ITS STOCK BY THE CORPORATION WAS NOT IN VIOLATION OF THE GENERAL LAW.

Quoting from the opinion of the Court (p. 1216):

> "The plaintiff's complaint alleges that soon after the corporation began doing business, it commenced to diminish its capital stock by surrendering a certain part thereof to its stockholders, and cancelling certain stock subscriptions and certain shares of stock that had been issued. The evidence showed that, beginning June 30, 1908, with the payment to Wood of $13,000.00 for 130 shares of stock agreed to be issued to him, and ending October 25, 1910, when 100 shares of stock were purchased from John L. McGinn for $6,000.00, shares of stock amounting to $56,000.00 were taken over by

the bank. * * * The defendants contend that the corporation had a right to purchase its own stock. * * *

"The defendants cite numerous authorities to sustain their contentions, and I am satisfied that the weight of authority in the United States is that a corporation, where not prohibited by statute or its charter, may purchase shares of its own stock."

There is abundance of authority in support of this much of the opinion of the Court.

The rule is thus stated in 7 Ruling Case Law, 528:

"According to the prevailing rule in this country, in the absence of any restrictions imposed by its charter or the general laws, a corporation has power, where the interests of its *existing* creditors are not adversely affected, to purchase its own capital stock."

The rule is thus laid down in 7 A. & E. Encyc. Law, p. 818:

"There is nothing in the nature of a corporation that renders it absolutely incapable of holding or dealing in its own stock. And in most states in which the question has arisen it has been held that corporations may purchase, hold and sell shares of their own stock, provided there is no charter or statutory prohibition in the way, and provided, further, that they act in good faith and without intent to injure or injury to creditors. This seems now to be the prevailing doctrine."

And there are innumerable authorities in support of this position.

Clapp v. *Peterson,* 104 Ill., 26;
City Bank of Columbus v. *Bruce,* 17 N. Y., 507;
State v. *Smith,* 48 Vt., 266;
Williams v. *Savage Mfg. Co.,* 3 Md. Ch., 418;
Taylor v. *Miami Exp. Co.,* 6 Ohio, 177;
Crandall v. *Lincoln,* 52 Conn., 73, 52 Am. Rep., 560;
Chicago, etc., R. R. Co. v. *Marseilles,* 84 Ill., 145;
Dupee v. *Boston Water Power Co.,* 114 Mass., 37;
St. Louis Rawhide Co. v. *Hill,* 72 Mo. App., 142;
Morgan v. *Lewis,* 46 Ohio St., 1, 17 N. E., 558;
Yeaton v. *Eagle Oil, etc., Co.,* 4 Wash., 183, 29 Pac., 1051;
Chapman v. *Ironclad, etc., Co.,* 62 N. J. L., 497, 41 Atl., 690;
Blalock v. *Kernersville Mfg. Co.,* 110 N. C., 99, 14 S. E., 501;
Howe Grain, Etc. Co. vs. *Jones,* 21 Tex. Civ. App., 198, 51 S. W., 24;
Chalteaux v. *Mueller,* 102 Wis., 525, 78 N. W., 1082;

Rollins v. *Shaver Wagon etc. Co.,* 80 Iowa, 380, 20 Am. St. Rep., 427, 45 N. W., 1037;

Oliver v. *Rahway Ice Co.,* 64 N. J. Eq., 596, 54 Atl., 460;

Nat. Bank of Peoria v. *Peoria Watch Co.,* 191 Ill., 128, 60 N. E., 859;

West v. *Averill Grocery Co.,* 109 Iowa, 488, 80 N. W., 555;

Dock v. *Schlichter Jute Co.,* 167 Pa. St., 370, 31 Atl., 656;

Marvin v. *Anderson,* 111 Wis., 387, 87 N. W., 226;

1 *Cook on Corporations,* sec. 311;

Porter v. *Plymouth Gold Mining Co.,* 101 Am. St. Rep., 573, 574;

Com'rs of Johnson County v. *Thayer,* 94 U. S., 631, 24 U. S. (L. ed.), 133;

Fitzpatrick v. *McGregor,* 133 Ga., 332, 65 S. E. 859; 25 L. R. A. (N. S.), 50;

Republic Life Ins. Co. v. *Swigert,* 135 Ill., 150; 25 N. E., 680, 12 L. R. A., 328;

Iowa Lumber Co. v. *Foster,* 49 Ia., 25, 31 Am. Rep., 140;

Wisconsin Lumber Co. v. *Greene, etc., Telephone Co.,* 127 Ia., 350, 101 N. W., 742, 109 A. S. R., 387, 69 L. R. A., 968;

New England Trust Co. v. *Abbott,* 162 Mass., 148, 38 N. E., 432, 27 L. R. A., 271;

Knickerbocker Importation Co. v. *State Board of Assessors,* 74 N. J. L., 583, 65 Atl., 913; 9 L. R. A., (N. S.), 885;
Pabst v. *Goodrich,* 133 Wis., 43, 113 N. W., 398, 14 Ann. Cas., 824;
Gilchrist v. *Highfield,* 140 Wis., 476, 123 N. W., 102, 17 Ann. Cas., 1257, and note;
Atlanta etc. Ass'n. v. *Smith,* 141 Wis., 377, 123 N. W., 106, 135 A. S. R., 42, 32 L. R. A., (N. S.), 137;
First Nat'l. Bank v. *Salem,* 39 Fed., 89;
Lowe v. *Pioneer Threshing Co.,* 70 Fed., 646;
Copper Bull Mg. Co. v. *Costello,* 95 Pac., 94;
Antonio v. *Sanger,* 151 S. W., 1104.

IV.

THE PURCHASE OF THE STOCK WAS NOT IN VIOLATION OF THE LAW OF NEVADA.

Quoting again from the opinion of the Court:

"Plaintiff contends that this (the purchase of its own stock by the bank) was in direct violation of the laws of Nevada, under which the corporation held its charter, and that under those laws the directors, at the time any stock was surrendered, are jointly and severally liable for the amount thereof; while the defendants contend that the corporation had a right to purchase its own stock, and that all of the stock thus taken over was retained as treasury stock, and subject to reissue, that some of it was actually resold, and that in no event can the pur-

chase of its own stock by a corporation be held to operate as a reduction of its capital stock, unless there is an express intention to retire such stock and not to reissue it. * * * I am satisfied that the weight of authority in the United States is that whether or not such purchase operates as a reduction of the capital stock, depends upon the intention with which it is purchased, and that if it is the intention to reissue the purchased stock, the capital of the corporation is not necessarily reduced by reason of the stock being held for a time as treasury stock. I am not satisfied, however, that this meets all the prohibitions contained in the statutes of Nevada. The Act not merely prohibits the directors from reducing the capital stock unless in the manner prescribed by law, or in accordance with the provisions of the certificate or articles of incorporation, but it makes it unlawful for them 'To divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company.' The law provides that this section shall not prevent the retirement or conversion of either stock or bonds, or the distribution of the earnings or accumulations of the corporation as provided for in the articles or certificate of incorporation, original or amended; but I find nothing in the articles of incorporation of this company which provides for such retirement or conversion, nor do I think the provisions of the articles giving the corporation authority to purchase stock and bonds can be held, as contended by defendants, to authorize it to purchase shares of its own stock and pay for them out of its capital (pp. 1216-1219).

"The most, therefore, that can be said of the authority of the directors to purchase stock of the corporation is, that while the directors had such right under the charter and the laws of Nevada, they could exercise such right only when the pur-

chase price was paid from net profits or surplus funds of the corporation, and not where any part of its capital stock was used for such purpose. There might be special circumstances where, apparently, this would result, and still the directors would not be liable for any damages, if in view of all the circumstances such a purchase was evidently for the best interests of the corporation. Even where corporations have been absolutely prohibited by statute from purchasing their own stock, it has been considered lawful for them to take their stock in payment of a debt past due, or where it seemed necessary in order to prevent loss to the corporation. Some of the transactions complained of in the complaint seem fairly to come within this rule."

It was the theory of the plaintiff that under the law of Nevada (Section 68 of the Corporation Act) he was entitled to recover from the defendants the value of any stock purchased, without regard to the question whether the defendants knew that the stock was being purchased by the bank, or were negligent, or were guilty of any fraud. The portion of Section 68 in point, reads as follows:

"It shall not be lawful for the trustees or directors * * * to divide, withdraw or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock, unless in the manner prescribed in this Act, or in accordance with the provisions of the certificate or articles of incorporation. And in case of any violation of the provisions of this section, the directors or trustees under whose administration the same may have happened

* * * shall in their individual and private capacity be jointly and severally liable to the corporation, and to the creditors thereof to the full amount so divided, withdrawn or reduced or paid out."

The finding of the court, No. LII, was:

"That the taking back of said stock and the payment therefor as aforesaid, was illegal, wrongful and in violation of the laws of the State of Nevada, under which said corporation was organized."

Assignment of Error No. 103.

We have already remarked that this finding is not a finding of any fact, but rather a conclusion of law from facts which are not pleaded or found.

From the portion of the Nevada Corporation Law which was offered in evidence, it is apparent that the Nevada Law does not forbid the reduction of the capital stock, but provides a method by which it may be done. There is nothing in the record to show that the method is any different under the Nevada Statute from the procedure followed in this case. Furthermore, the Nevada Statute provides that the articles of incorporation may provide a method for the reduction of the capital stock. *Therefore, if a reduction of the capital stock is effected by the corporation's purchase of its own shares, it may follow that the articles of incorporation of this cor-*

poration have provided a method, which has in fact been followed.

In this connection we refer to the XLI finding (page 204), as follows:

> "That the Articles of Incorporation of said corporation authorized and empowered said corporation among other things, to buy and sell gold and silver bullion, foreign coin, *stocks,* bonds, and all other property, real and personal, and to do any business and exercise any powers incident to the banking business, or necessary or proper to the furtherance and attainment of the purposes of said bank."

Thus the articles of incorporation expressly authorized the company to purchase stock, and this includes its own stock.

We shall, however, contend that there was no reduction of the capital stock effected by the purchase of the shares in question.

V.

WHEN A CORPORATION BUYS SHARES OF ITS OWN CAPITAL STOCK, ITS CAPITAL STOCK IS NOT REDUCED BY THAT AMOUNT, NOR IS THE STOCK MERGED.

The rule is well stated in Cook on Corporations, Sec. 314, by the following language:

> "When a corporation buys shares of its own capital stock, the capital stock is not reduced by that amount, nor is the stock merged. So long, however, as the corporation retains the ownership,

the stock is lifeless, without rights or powers. It cannot be voted nor can it draw dividends, even though it is held in the name of a trustee for the benefit of the corporation. But at any time the corporation may resuscitate it by selling it and transferring it to the purchaser. Such sale may be made upon the authority of the corporate directors. It may be sold at its market value, and need not be held for its par value, as is necessary in an original issue of stock."

Ruling Case Law thus states it:

"The rule is well settled that where stock is acquired by a corporation, either by purchase, surrender, or forfeiture, it is not thereby extinguished, unless it is acquired by the corporation with that intention, but may be reissued. It remains dormant until it is reissued, and the voting power thereon is suspended whether it is held by the corporation or by a trustee for it" (7 R. C. L., Sec. 534, p. 552).

In *American Railway Frog Co.* v. *Haven,* 101 Mass., 398, 3 Am. Rep., 379, the Court said:

"The case finds that the capital stock was divided into 2,000 shares, all of which were properly issued to the original stockholders; and that sometime afterward 400 of these shares were transferred by some of the stockholders to Aaron N. Clark 'to hold for the benefit of the corporation.' If these transfers had been made directly to the corporation, without the intervention of a trustee, it would hardly be contended that it would thereby become entitled to vote at a meeting of stockholders. A corporation cannot literally be one of its own stockholders in the full sense of that term. Such a

transfer might not operate as a mere surrender or cancellation of stock, unless so intended. *It would not diminish the amount of the capital, nor necessarily reduce the number of shares.* The corporation might perhaps receive such a transfer, and hold the stock so conveyed to it, for the purpose of re-issue to new subscribers or purchasers. * * * The position of these shares, in our judgment, is the same, to all intents and purposes, so far as the right of voting upon them is concerned, as if they were held directly by the corporation itself; and, until they are sold and transferred by its authority, the right of voting upon them is suspended."

Ralston v. *Bank of California,* 112 Cal., 208, was a case where the bank was sued for conversion of certain shares of its own capital. The Court said:

"The argument that the corporation becomes the owner of the shares converted, and hence that its stock is reduced otherwise than in the manner provided by law (Civ. Code, sec. 359) and hence further that such conversion is legally impossible because contravening the policy of the law, has no great force. If necessary to save itself from loss, the bank might have contracted for and have received the title to these shares in payment of Baum's debts to it, and the transaction would have been perfectly legal (*Ex parte Holmes,* 5 Cow., 426). With the same purpose in view the bank, apparently in good faith and under claim of right, refused the registry, and this had the undesigned effect of converting the shares; and it is not perceived how acquisition of title by this means can, though wrongful as regards the plaintiff's, be more obnoxious to public policy than by contract in the

case supposed. The authorized capital is not reduced, for the shares are not extinguished, but may be reissued."

So, also, in the case of *Knickerbocker* v. *State Board,* 74 N. J. Law, 583, 9 L. R. A. N. S., 885, it was held that shares of stock once issued remain outstanding until retired in the legal manner, and, therefore, when a corporation bought its stock, it was not retired or merged.

And in the case of *Pabst* v. *Goodrich,* 133 Wis., 43, 113 N. W., 398, it was held that a solvent corporation has a right to purchase and hold its stock, and that such purchase does not amount to a cancellation of such stock. The Court said:

"A corporation clearly has the right to purchase its stock, keep it alive, and treat it as assets."

In *Porter* v. *Plymouth Gold Mining Co.,* 101 Am. St. Rep. 569, 575, the Court says:

"Would the capital stock of the company have been reduced in violation of Section 438 of the Civil Code by the purchase of the stock? Section 438 of the Civil Code provides as follows: 'Directors of corporations must not * * * reduce or increase the capital stock except as hereinafter specially provided.' The mere repurchase of this stock would not tend to decrease the capital stock of the company unless the directors should absolutely merge or extinguish the stock after its repurchase. The company could only deal with it just the same as it had done before the sale. It could be sold and issued again. The company

would be in no different position as to this stock than it would have been had the transaction with appellant with regard to it never occurred. When it is transferred to the company, it becomes a part of the property. It is there for the creditors and stockholders. The capital stock is not decreased. A portion of the capital of the company may be unavailable until the stock is again sold, but nothing is destroyed. Whether the stock is merged or extinguished or held as an asset for sale, is much a matter of intention on the part of the corporation. *If it is unlawful to decrease the capital stock, presumptively the directors did not violate the law, and it would require some positive showing to the contrary to overcome this presumption.*"

The following authorities lend sufficient support to this position:

Taylor v. *Miami,* 6 Ohio, 177;
City Bank of Columbia v. *Bruce,* 17 N. Y., 507;
Williams v. *Savage,* 3 Md. Chan., 418;
Ex parte Holmes, 5 Cow., 426;
State v. *Smith,* 48 Vermont, 266;
Morgan v. *Lewis,* 17 N. E., 558;
Fremont v. *Thompson,* 91 N. W., 376, 378;
4 *Thompson on Corporations,* 4078;
2 *Clark & Marshall on Corporations,* sec. 411-411(d);
Republic Life Ins. Co. v. *Swaggert,* 12 L. R. A., 328.

The by-laws of the corporation provided as follows:

> "All issued and outstanding stock of the company that may be donated to or purchased by the company or which shall revert to the company by reason of failure to pay for the same, shall be Treasury stock, and shall be held subject to disposal by the action of the board of directors. Said stock shall neither vote nor participate in dividends while held by the company.
>
> "The board of directors shall be given the first option to purchase for the corporation the stock of any stockholder, and shall be entitled to purchase the same, provided said board of directors shall offer to pay to said stockholder the same amount, as he might obtain from other persons" (p. 798).

This stock that was surrendered to the corporation was credited, as the evidence shows, to treasury stock, and was thereafter carried as an asset of the corporation (pp. 354 *et seq*).

No evidence was introduced to show that the directors disposed of this stock other than as provided in the by-laws.

If it had been the intention of the directors to reduce or retire this surrendered stock, they would not have carried it as treasury stock, and would not have carried the capital stock of the corporation at 300 shares, the amount provided for in the articles of incorporation. Furthermore, the Court must presume that the directors did not violate the law, and

some positive evidence must be given to the contrary to overcome this presumption. The only evidence upon this point is the evidence of James W. Hill to the effect that it was not the intention of the directors to reduce the capital stock, or to retire the surrendered stock, but that, on the contrary, it was their intention to re-issue the same. He testified:

"Q. Do you remember whether or not prior to the adoption of the by-laws, the question of the corporation buying the stock of any of its members was discussed?

"A. At which meeting?

"Q. Prior to the stockholders' meeting of March 12, 1908, when the by-laws were adopted?

"A. Yes. The matter had been discussed.

"Q. What was the sense of the stockholders upon that matter?

"A. That it would be advisable to have the bank have the first option to buy back its own stock.

"Q. For what reason?

"A. So that they could control the stock, or so that it couldn't fall into other hands and be used for purposes detrimental to the bank's interests; in other words, we didn't want any of the other banks to get hold of any of that stock.

"Q. Do you know whether any advice was taken at that time as to whether the corporation had the power to buy in stock?

"A. The whole transaction was handled under the advice of the firm of McGinn & Sullivan, who were then attorneys for the bank (Tp., 798).

"Q. What was the intention of the board of directors in regard to the stock that was surrendered

and turned into the treasury as to retiring it for good, or reissuing it?

"A. The intention was at all times to reissue it to other purchasers" (Tp., 799).

The evidence further discloses that some of this surrendered stock was afterwards issued to others. (Tp. p. 826.)

VI.

THE PURCHASE OF THE STOCK WAS WITHOUT THE KNOWLEDGE AND AGAINST THE INSTRUCTIONS OF THE DIRECTORS.

The portion of the opinion of the Court dealing with this subject reads as follows:

> "With the exception of these [the Strandberg and McGinn] transactions, it seems that the purchase of the other shares of stock, as charged by the complaint, were made, if not with the direct personal knowledge of the directors, at any rate under such circumstances that knowledge thereof was brought home to them, and they must be held to have ratified the same; also that they were made at times when the corporation had not surplus earnings or profits on hand, but were, in fact, made from the capital stock. That the directors at one time, at all events, had knowledge of such proceedings, is evident from the minutes of their meetings, where, on July 13, 1908, they passed the following resolution:
>
> "'The president submitted a written report in detail, showing the condition of the affairs of the bank as of July 11, 1908. The report was examined in detail, and on motion duly made and

seconded, it was ordered filed. Under questions of this report, question of refunding to those desirous of giving up their stock in the Fairbanks Banking Company was discussed, and it was the sense of the meeting that any stockholder desirous of giving up the stock be paid for same and stock returned to the treasury of the bank.'

"While undoubtedly the directors at that time in good faith believed that they had a right to do this, it should not exempt them from liability for the results, if their action was in fact contrary to the provisions of the statute; and the directors in office at that time should be liable for stock surrendered, although they may not have had knowledge of each particular transaction, until some different course of proceeding was adopted by the board; and also directors in office, when subsequent surrenders were made, under similar conditions, should be liable for the same" (pp. 1227-1229).

The findings in this connection are as follows:

"That there was submitted to said board of directors at its meeting on July 13, 1908, a written report in detail showing the condition of the affairs of said bank, which said report was examined in detail and was ordered filed, and, under the question of this report, the question of refunding to those desirous of giving up their stock in the Fairbanks Banking Company was discussed, and it was the sense of the meeting that any stockholder desirous of giving up the stock, be paid for the same, and the stock returned to the treasury of said bank" (p. 201).

"That after said bank took said stock of said Wood into its treasury, frequent and continuous surrenders of its stock were made to its stockholders, amounting in all to thirty-eight different

and distinct transactions, aggregating a total of $43,000 exclusive of said Wood's stock. That the stock so taken back by the corporation was charged to the treasury stock account, and of the same only ten shares of the par value of $1,000 were ever reissued. That said stock surrenders continued down to and including October 25, 1910, when the last surrender was made, being the McGinn stock of the par value of $10,000, for which the sum of $6,000 in cash was paid by the bank to said McGinn" (p. 206).

As a matter of fact the defendants had no actual knowledge of these surrenders of stock. (See pages 857, 858, 924, 926 and 1020.) The point is covered by Assignments of Error, Nos. 15 to 26.

On September 14, 1908, the following resolution was adopted by the executive committee, which was approved by the board of directors on October 14, 1908:

"The matter of the bank taking over Mr. Hans Stark's stock in the company was brought up for discussion, and it was the sense of the meeting that it was not policy at this time to continue taking over stockholders' interest" (p. 863).

A similar resolution was passed by the executive committee on February 3, 1909:

"A communication from John E. Thrash of Seattle, Washington, advising that he held a block of 25 shares of Fairbanks Banking Company stock for a client of his and was desirous of disposing of the same, and asking for information as to the value of the stock and if the bank desired to pur-

chase same. It was the sense of the meeting that an answer be directed to him that the bank did not desire to buy any stock at the present time, and that they furnish the last published statement of the bank" (p. 864).

And again on March 15, 1909:

"The following requests from stockholders as to the bank purchasing their stock was considered: H. B. Parkin 10 shares, O. E. Tackstrom 5 shares. It was the sense of the meeting that the bank observe the rule established at a previous meeting of the board wherein it was decided not to buy in any more of the bank's stock" (p. 864).

This last resolution was approved by the Board of Directors on April 12, 1909 (p. 864).

It will be seen that the evidence upon which the Court based its conclusion that the directors were chargeable with knowledge of the stock surrenders, was very slender, it being in fact confined to the resolution of July 13, 1908, and some special transactions, such as the surrender of Wood's stock (p. 200), which was taken back by previous agreement; the purchase of McGinn's stock which was done in order to save the bank from injury (p. 208); and the surrender of the Strandbergs stock (p. 206), which was taken in partial settlement of previous indebtedness. On the other hand, there was the positive testimony of the defendants that they had no actual knowledge of the most of the stock surrenders, and the record evidence of the minutes of the executive committee and board of directors above referred to.

VII.

THE DIRECTORS ARE NOT PRESUMED TO HAVE KNOWN OF THE PURCHASE OF THE STOCK BY THE OFFICERS.

In *Rudd* v. *Robinson,* 126 N. Y., 113, 22 Am. St. Rep., 817, it was held that:

> There is no rule of law which charges a director or stockholder of a corporation with actual knowledge of its business transactions merely because he is such director or stockholder.

In *First National Bank* v. *Drake,* 29 Kan., 311, 44 Am. Rep., 646, the Court said:

> "We do not think it can be said, as a matter of law, that the directors are conclusively presumed to know the general business of the corporation."

Knowledge of some of the directors does not imply knowledge of all:

> *Leggett* v. *New Jersey, Etc., Co.,* 1 N. J. Eq., 541; 23 Am. Dec., 728.

Directors are not responsible for illegal or negligent acts of the cashier or other officers by whom the bank is managed, if they have no knowledge of such acts and do not connive at them or wilfully shut their eyes and permit them.

The leading case is *Briggs* v. *Spaulding,* 141 U. S., 662, in which it is held that knowledge of all the affairs of a bank, or of what its books and papers

would show, cannot be imputed to a director for the purpose of charging him with a liability. The Court said:

> "Directors of a bank are entitled to commit the banking business to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention. * * *
>
> "'I know of no law,' said Vice-Chancellor McCoun, in *Scott* v. *Sepeyster,* 1 Edw. Ch., 541, 6 L. ed., 239, 'which requires the president or directors of any moneyed institution to adopt a system of espionage in relation to their secretary or cashier or any subordinate agent, or to set a watch upon all their actions. While engaged in the performance of the general duties of their station, they must be supposed to act honestly until the contrary appears; and the law does not require their employers to entertain jealousies and suspicions without some apparent reason. Should any circumstance transpire to awaken a just suspicion of their want of integrity, and it be suffered to pass unheeded, a different rule would prevail if a loss ensued; but, without some fault on the part of the directors, amounting either to negligence or fraud, they cannot be liable.'
>
> "Nor is knowledge of what the books and papers would have shown to be imputed. In *Wakeman* v. *Dudley,* 51 N. Y., 32, Judge Earl observed in relation to Dalley, sought to be charged for false representations in the circular of a company of which he was one of the directors: 'He was simply a director, and as such attended some of the meetings of the board of directors. As he was a director, must we impute to him, for the purpose of

charging him with fraud, a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation, like a railroad, or banking, or insurance company, is one of constant peril. The affairs of such a company are generally, of necessity, largely intrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents, and if the directors, when actually cognizant of no fraud, are to be made liable in an action of fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should.'

"And Sir George Jessel, in *Hallmark's Case,* L. R., 9 Ch. Div., 332: 'It is contended that Hallmark, being a director, must be taken to have known the contents of all the books and documents of the company, and so to have known that his name was on the register of shares for fifty shares. But he swears that in fact he did not know that any shares had been allotted to him. Is knowledge to be imputed to him under any rule of law? As a matter of fact, no one can suppose that a director of a company knows everything which is entered in the books, and I see no reason why knowl-

edge should be imputed to him which he does not possess in fact. Why should it be his duty to look into the list of shareholders? I know no case, except *ex parte* Brown, which shows that it is the duty of a director to look at the entries in any of the books; and it would be extending the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge which it is sought to impute to him in this case.'

"We are of the opinion that these defendants should not be subjected to liability upon the ground of want of ordinary care, because they did not compel the board of directors to make such an investigation and did not themselves individually conduct an examination, during their short period of service; or because they did not happen to go among the clerks and look through the books, or call for and run over the bills receivable."

In the article on Banks, 3 R. C. L., 462, it is said:

"It is difficult to lay down any general rule by which the liability of bank directors for the acts of their subordinate officers can be measured. As the directors usually are men who are engaged in other pursuits, and who are not expected to devote their whole time and attention to the affairs of the bank, they must necessarily confide the active management of the business largely to their executive officers, and just what degree of supervision and control will be sufficient to relieve them from liability for the acts of such officers is rather uncertain. The courts have been reluctant to establish a strict rule of liability, lest, as has been frequently said, by so doing they deter men of integrity and ability from accepting the responsibilities of the position. Generally it is declared that directors must exercise reasonable care and

prudence, but this rule is necessarily indefinite, since in many cases it is hard to determine just what reasonable care and prudence would be. While it is incumbent on the directors to appoint all the officers necessary to carry on the business of the bank, and to use ordinary diligence in the selection of men qualified to fill such positions, they do not guarantee the honesty and diligence of the employees they select; and after having selected employees of unquestioned reputation they are justified in acting on the supposition that such employees will be honest. They are not required to adopt any system of espionage over their cashier, or any of their subordinate agents, or to entertain suspicion without some apparent reason and until some circumstance transpires to awaken a just apprehension of want of integrity, they have a right to assume that such agents are honest and faithful. And it may be stated as well settled that directors who have exercised care to select honest men as cashiers or other officers are required to exercise only ordinary care and diligence in the supervision and control of their conduct, and are not responsible for losses resulting from the wrongful act or omission of those selected unless the loss is a consequence of their own neglect of duty."

Mason v. *Moore,* 76 N. E., 932;
Utley v. *Hill,* 49 L. R. A., 323;
Warner v. *Penoyer,* 44 L. R. A., 761;
Sweutzel v. *Penn. Bank,* 30 Am. St. Rep., 718.

VIII.

THE JUDGMENT OF THE DIRECTORS WAS CONCLUSIVE AS TO THE DIVIDEND.

It is the general law that the judgment of the directors, if exercised in good faith, is conclusive in the matter of dividends. If the directors, not having been guilty of negligence, were honestly of the opinion that the condition of the corporation warranted the declaration of the dividend, their action in so declaring it cannot be made the foundation of proceedings against them under a penal statute. It was necessary for the plaintiff to allege, and he did allege, that the defendants knew, or in the exercise of due diligence should have known, that the corporation had not net profits out of which the dividend could lawfully be paid. It was, however, necessary for him to go further and show that the statute under which he sought recovery rendered it immaterial whether the action of the directors was, or was not, in good faith, and whether such statute departed so far from the general rule that the directors were liable for the declaration and payment of the dividend, if in fact the profits did not exist, independently of whether they were guilty of any negligence or not. It was, therefore, as we have said before, necessary for the plaintiff to declare upon the statute of Nevada, which was an ultimate fact that he would have to plead and prove. Without the statute set

forth in the pleading he could not state a cause of action. Nor, as we have also said, was there any finding by the Court as to what the Law of Nevada was.

> "In the absence of any statute on the subject, the liability of bank directors for resulting losses, where they knowingly exceed their authority, is established without reference to the question whether or not what they did might be justified on the principle of reasonable care. But if they do not knowingly exceed their authority they do not necessarily incur liability. Thus, that the directors did not know it was unlawful to employ one of their number as an agent of the bank, and to give him a compensation in addition to his salary as a director for the performance of extraordinary services, will, it has been held excuse them from personal liability therefor."

3 *Ruling Case Law,* 460;
Goldbold v. *Branch Bank,* 11 Ala., 191, 46 Am. Dec., 211.

The law indulges the presumption that dividends have been declared out of the profits and not otherwise.

Van Dyke v. *Milwaukee* (Wis.), 146 N. W., 812;
Miller v. *Payne,* 150 Wis., 354, 136 N. W., 811;
Soehnlein v. *Soehnlein,* 146 Wis., 330, 131 N. W., 739;
Thompson on Corporations, Vol. 8, p. 564.

In the absence of a statute specifically covering the case, the rule is that, when the directors declare a dividend in good faith and without negligence, they are not to be held liable merely because the dividend turns out to have impaired the capital stock. Directors are not personally liable for dividends improperly paid, where they honestly believe in a state of facts which would justify the payment and rely upon the general manager's certificate as to the assets.

Cook on Corporations, Sec. 550.
Excelsior Petroleum Co. v. *Lacey,* 63 *N. Y.,* 422 (1875).

In *Stinger's Case,* L. R. 4 Ch. App. 475 (1869), it was held, in accordance with this view, that where the action of a board of directors in making a dividend was bona fide, they are not liable for errors of judgment in preparing a balance sheet showing the assets of the concern.

The directors are not personally liable for dividends declared, even though, in estimating the assets, claims are included which ultimately prove to be bad, the result thereby being that the dividend was paid out of the capital.

Re London & Gen. Bank, 72 L. T. Rep., 227 (1894); aff'd. (1895), 2 Ch., 166, 673;
2 *Kingston Cotton Mill Co.* (1896), 1 Ch., 331.

Directors are not liable for illegal declaration of dividend when acting in good faith.

2 *Clark & Marshall,* Sec. 528 (e);
Excelsus v. *Lacey,* 63 N. Y., 422;
Chick v. *Fuller,* 114 Fed., 42;
5 *Thompson,* Sec. 5325, and cases cited.

It may be said as a prime rule, in common law actions against directors of an insolvent corporation, for damages on the ground of declaring and paying dividends with knowledge that the corporation's capital was impaired, fraud and bad faith must be proved in order to warrant a recovery.

5 *Thompson on Corporations,* Sec. 5324. Cases cited.

Nor can the directors be held personally liable for money paid out for dividends to a greater amount than net profits, after deducting losses and bad debts, because there were bad debts in fact but supposed to be good; bad judgment without bad faith not making the directors individually liable.

Tiffany on Banks, Sec. 99, page 380.

The fact that a stockholder in an insolvent bank, having a capital stock of $200,000 at the time he sold and transferred his stock, was a director and was dissatisfied with the management, is not sufficient to charge him with knowledge of its insolvency

so as to render him liable for a subsequent assessment on the stock, although it was in fact insolvent, where its assets on their face largely exceeded its liabilities and it appeared that the directors were deceived as to their value.

Fowler v. *Grouse,* 175 Fed., 646.
Clews v. *Bardon,* 36 Fed., 617.

In *Lexington* v. *Bridges,* 7 B. Mon., 556, 46 A. D. 528, it was held that the directors of a corporation are not personally liable to creditors of the company for the amount of a dividend declared by them at a time when there were no profits to be divided, if they acted in good faith in a mistaken belief that such a fund existed.

The Court said:

> "Bridges, having an unsatisfied judgment against the railroad company, upon which an execution had been returned no property, brought this suit into chancery, to obtain satisfaction of his judgment, making various individuals defendants, alleging that some of them were indebted to the company on account of the reception of illegal dividends, others on account of stock subscribed, and that others had acted as directors and managers of the affairs of the company, and by declaring a distribution of the profits, when no profits existed, had by their illegal management of a fund set apart by the charter for the payment of the debts, of which they had the control, rendered themselves individually liable to the creditors of the company.

"The individuals who acted as directors at the time the dividends were made, rely in their defense on the following grounds: First, that there were net profits to divide, and consequently the declaration of the dividends was legal, and authorized by the charter. Secondly, if there were no profits to divide among the stockholders, that in declaring the dividends they acted in good faith, under a mistaken conception, it may be, of what constituted profits, and without a full knowledge of the actual state of the affairs of the company, having been misled by an incorrect exposition of its condition persented by the officer regularly appointed and authorized under the charter to keep its accounts, but without any wrongful intention on their part, and that therefore they are not individually responsible. * * *

" * * *We are not of opinion that in directing the payment of these dividends, there was anything fraudulent on the part of the directory. They no doubt believed that they were acting legally and properly. They supposed that profits existed, when in reality there were none. If they are to be held individually liable on account of this mistake, it must be on the ground that if it were an error of judgment, by accepting the office, they professed to be in the possession of the skill and qualifications necessary for a faithful discharge of all its duties, and are therefore not exonerated when the injurious act results from the absence of such qualifications, or if it were a mistake of fact that in accepting the position they occupied, they assumed the discharge of certain duties to the company and to those persons dealing with it, the faithful performance of which required the exercise on their part of unremitting vigilance in relation to the condition of the matters intrusted to their control, as well as a reason-

able and prudent discretion as to the manner in which they were managed, and that they failed to use as much vigilance on the occasion as the responsibility of their position imposed on them. We are satisfied, however, that if they were guilty of negligence to any extent, it is not of that gross and palpable character that would render their conduct so reprehensible as to subject them to the imputation of a personal or even a legal fraud."

Judge Thompson lays down the rule, as follows:

"These statutes [imposing liability for dividends improperly declared] are penal in their nature, and obviously do not make the directors liable where the dividend is declared in good faith, they believing at the time that the company is solvent, and upon reasonable grounds. Probably directors would not be held liable under such a statute, where the belief in the company's solvency was an error of judgment attributable to negligence, unless the negligence was of so gross and flagrant a character as, in the eye of the law, to be equivalent to actual fraud."

3 *Thompson on Corporations,* Sec. 4295.

In *Tradesman Pub. Co.* v. *Knoxville C. W. Co.,* 95 Tenn., 634, 49 A. S. R., 959, the Court discusses the effect of a charter provision imposing a liability of this character and says:

"It is next assigned as error that the chancellor refused any relief against the directors on account of the payment of dividends, amounting to $28,000. It is contended by counsel that said dividends were paid at a time, and under circum-

stances that rendered the payment unlawful, and was a diversion of the assets of the corporation. The charter of this company provides, viz., 'If the directors declare and pay any dividend when the company is insolvent, or which declaration of a dividend would diminish the amount of the capital stock, they shall be jointly and severally liable to creditors for the amount of dividends thus declared. Any director may avoid liability by voting against the dividend, or by filing his objections, in writing, as soon as he ascertains a dividend has been made.'

"The dividends in question were paid, viz.: April 30, 1884, four per cent, $4,280; April 30, 1886, four per cent, $4,280; April 30, 1887, four per cent, $4,280; April 30, 1888, four per cent, $4,280; April 30, 1889, five per cent, $5,350; April 30, 1890, six per cent, $6,420. It is insisted that the first dividend, paid April 30, 1883, was paid out of the proceeds of the bonds which had been sold by the company at a discount of twenty-two per cent, and that the remaining dividends were paid at a time when the corporation was insolvent, and when its indebtedness exceeded the amount of the paid-up capital stock. The chancellor, upon the hearing, was of the opinion that the directors were warranted in the payment of these dividends, and that the defendants were not liable to the creditors of the corporation. It is true, as argued by counsel, that when these dividends were declared, the indebtedness of the corporation did exceed the amount of capital stock paid in, but, under the statute last cited, this fact does not determine the liability of directors. The inhibition of the statute is against declaring dividends when the company is insolvent or when such dividend will diminish the amount of the capital stock. If the assets are reasonably worth, *or are honestly*

believed to be worth, largely more than the company's indebtedness, and upon this basis profits are estimated, the company is not insolvent, although its indebtedness may exceed its capital stock paid in. The record discloses that when these dividends were declared, this company was engaged in a very extensive business, and was realizing large receipts from the sale of the products of its manufacture. Its assets were estimated by its directors to be largely in excess of the company's liabilities, and the proof shows that said assets, which consisted largely of mineral lands, were largely more valuable then than at a later period. The proof indicates that during the years covering the declaration of dividends the company was realizing enough profit on its business, and there was no reason why those profits should not have been distributed among its stockholders. The conduct of the directors is to be viewed in the light of the financial status of the company at that period, and not to be determined by its ultimate insolvency, precipitated, doubtless, by the universal paralysis of business then prevailing throughout the country. When the large volume of business transacted by this company is considered, it is not perceived how its insolvency could have been superinduced by the small dividends declared. We are of opinion there was no error in the action of the chancellor upon this branch of the case."

Again in *Witters* v. *Sowles,* 31 Fed., 3, the Court said:

"This bill is not brought to charge the defendants for money received by them as stockholders from dividends, but for losses to the bank itself for unlawfully or wrongfully declaring dividends.

"By Section 5204, dividends to a greater amount than net profits, after deducting losses and bad debts, are prohibited; and debts on which interest in past due and unpaid for six months, unless well secured and in process of collection, are defined to be bad debts. The assets of this bank did not so consist of bad debts, within this definition, at the time when they were made, as to make the dividends improyer. There were debts which were in fact bad in the result to an extent so great as to wipe out the profits from which dividends could be made when the later ones were declared. The defendant Burton is not shown to have participated in making the dividends. Those who did misjudged as to the value of the assets. The evidence does not warrant the conclusion that they took this method of dividing the assets of the bank among themselves when they knew that dividends could not properly be made. It is not considered, therefore, that the defendants are liable for the amount of the dividends because they were unlawfully or wrongfully declared *Spering's Appeal,* 10 Am. Rep., 689; *Thomp. Liab. Off.,* 351; *U. S.* v. *Britton,* 108 U. S., 199, 2 Sup. Ct. Rep., 531."

IX.

THE DIRECTORS WERE ENTITLED TO BELIEVE THE CORPORATION IN POSSESSION OF A SURPLUS AT THE TIME OF THE DECLARATION OF THE DIVIDEND.

The assets, as shown by the statement of April 12, 1910 (p. 385), consisted of moneys due from sundry banks; coin in hand; dust on hand and real estate. About these items there was no question. The assets also included sundry stocks carried on the books at

$654,449.00, and loans and discounts carried on the books at $338,410.94. If these last two amounts represented the true value of the items, the corporation was solvent and a surplus existed from which a dividend might be lawfully declared.

Among the stocks included in this statement, and the only one questioned, was the stock of the Gold Bar Lumber Company, which was carried at $341,949.00. There was no finding that said Gold Bar Lumber Company stock was not of that value. The only findings on that subject were:

> "That among the other assets of said partnership so accepted by said officers and directors was four-fifths of the capital stock of the Gold Bar Lumber Company, a corporation existing in the State of Washington, which said stock was accepted and paid for at the valuation of $341,949.00, and said stock was at all times during the existence of said corporation carried as an asset in said sum" (p. 199).
>
> "That at the time said investment was so made as aforesaid, said Lumber Company was closed down and immediately prior to closing down, it had been operated at a loss, that in so far as said lumber company was able to operate since the purchase of said stock by said corporation, all of its earnings and a part of its surplus have been expended in the purchase and repair of equipment for said mill, and in the operation of said mill is standing timber was being consumed and its best asset exhausted. That no dividends have been paid on the capital stock of said lumber company during the time the same was owned by said bank" (p. 204).

It will be seen that these findings do not determine anything as to the value of the Gold Bar Lumber Company, and are entirely consistent with the value of the Gold Bar Lumber Company, being the amount at which it was carried on the books of the company.

We shall show further on, by the evidence, that the directors were entitled to consider the Gold Bar stock as worth that amount.

The only other item about which there could be any question was the bills receivable. On this subject there is no direct finding either. There was a finding:

> "That of the notes accepted from said partnership as aforesaid and paid for by said corporation, there were charged on December 31, 1907, by said partnership on the books of said partnership to an account known as 'doubtful account' the sum of $22,979.99 and said doubtful account, so including said notes in said amount, was then depreciated on the said books to the amount of thirty-three and one-third per cent. thereof, which said notes were accepted by said corporation and paid for by them in the amount aforesaid, to-wit, $22,979.99, all of which said notes were then past due, and of which there still remains unpaid and uncollectible the sum of $12,860.61. That of said notes so charged to said doubtful account as aforesaid, there was on December 31, 1909, charged by said corporation to the account of profit and loss on the books of said corporation the sum of $12,192.80" (p. 202).

but there was no direct finding that the notes and bills receivable were not worth their face value, ex-

cept in the single case of the notes of the Tanana Electric Company, of which more hereafter.

Nearly every item embraced in the bills receivable was gone over at length, at the trial, and from the testimony of the witnesses it is plain that the condition of affairs was such as to justify the directors in believing that the true value of the bills receivable was what it was shown to be upon the books of the company. (See pp. 867-890; 703-717; 836-848.)

There is no evidence, however, beyond the fact that the notes are past due and unpaid, to show that they are now valueless, or that they were valueless on the 12th day of April, 1910, on the 31st day of December, 1909, or at the time they were passed on by the Committee of Stockholders and accepted as valid assets by the original Fairbanks Banking Company at the time of the transfer from the partnership to the corporation.

In considering the value of the bills receivable and the good faith of the directors in that connection, it is important to remember the conditions under which the banking was conducted at Fairbanks. In a remote mining camp like Fairbanks any bank which failed to extend its accommodations to the miners might just as well go out of existence. Loans which would be highly hazardous if made by a bank under normal conditions in the United States might be conservative loans under conditions which existed at Fairbanks.

The method of procedure was frequently this: The owner or lessee of a placer claim which prospected well would apply to the bank for a loan to enable him to conduct his mining operations. This loan he would secure by a mortgage on his interest in the claim, as well as his working tools and machinery. The value of the claims on the various creeks was well known to the bank, and the bank had a representative on its Board of Directors from each of the principal creeks, with the object in view of being able to pass intelligently and accurately upon any applications that might be made for loans. Nor did the banks look alone to the interest on these loans for their revenue; a large part of their business consisted in dealing in the gold dust. The existence of the loan and the bank's assistance in the development of the claim, thereby gave it a first call on the proceeds, very much to its credit.

Luther C. Hess, cashier of the First National Bank, gave an interesting account of the customary procedure (p. 881).

> "Q. Will you state for the purpose of the record, and the information of the Court, just what the ordinary transaction was when a miner took a lease upon a piece of undeveloped property,—mining property,—and found what apparently was the paystreak.
>
> "Q. What was the almost universal practice of a miner under those circumstances?
>
> "A. If a miner had taken a lease on property that he supposed had value, or he had already

sunk a shaft and shown value, and was unable to finance the proposition himself, he usually obtained some credit from the merchants—a considerable credit usually—then, in order to pay necessary bills, he usually borrowed from the banks, sometimes giving a mortgage on his machinery and sometimes not.

"Q. And a mortgage on his leasehold?

"A. Sometimes a mortgage on his leasehold.

"Q. The bank having made such a loan, what was the practice of the bank when the loan fell due?

"A. If the man was able to go on, or if there was any chance of him going on, the bank would be very careful not to put him out of commission, because it would stop the development of the country and stop the operations.

"Q. In your experience have you observed many cases where loans of that kind have been made resulting in great profit to the borrower and to the bank? (p. 881).

"A. I know that that has been almost the universal practice with the banks, and most of those have been paid.

"Q. From your experience, would you say that it was an exercise of good judgment on the part of the bank not to force the collection of the loan at the time it fell due, under those circumstances?

"A. Well, of course, you would have to judge every instance by itself. But, as a rule, I should say that was true.

"Q. What is the fact, from your experience and observation, as to whether that practice, that course of dealing by the banks, has resulted largely in the development of this country?

"A. It certainly has.

"Q. What would you say in regard to the ability of the majority of the miners who have opened

and developed and operated ground, to finance their operations in the first instance?

"A. As a rule they have not been able to finance their operations. That has been the exception rather than the rule.

"Q. Financing the operations of a miner, whether he was a layman or owner, results generally, or did it generally result in that miner bringing to the bank the gold-dust which he produced?

"A. That was one of the considerations that entered into the reason for the bank advancing to the operator, because one of the principal profits of the banks in this portion of the country is derived from the purchase and sale of gold-dust, and all of the banks have been striving as much as possible to get the greatest share of the gold-dust.

"Q. That was the principal cause of this fierce competition, that has been testified about?

"A. Yes, sir" (pp. 882-883).

It appeared from the evidence that a great deal of the paper held by the bank was past due. Counsel for the Receiver seems to attach a fearful import to the expression "past due paper", as if the fact that the paper past due necessarily meant that it was worthless. As a matter of fact much of the paper in banks under normal conditions is past due paper, and frequently the very fact that it is adequately secured, or that the makers are considered perfectly solvent, impels the bank to leave the paper as matured paper, rather than have it renewed, and thereby part with its right to collect on demand.

W. H. Parsons, who had been in the banking business in Fairbanks, testified on this subject as follows (p. 565):

"Q. State whether or not it was customary among the banks in Fairbanks at that time to hold paper overdue without having it renewed?

"A. In some instances, yes.

"Q. Why didn't you have the paper renewed in these particular cases I have enumerated?

"A. In many instances the notes were secured notes, either secured by a chattel or real mortgage, and in that instance we obviously would prefer to continue the old notes rather than to take new notes.

"Q. Why?

"A. Well, in that country during the interim of taking the new note, the mortgage would describe a specific note due at a specific time; now if we were to take a new note and for any reason there should be a transfer, that there should be a change in the records as regards the ownership of the property during that interim, it is just barely possible that there might be some change like that, and that would necessitate an abstract and looking it up, which was always expensive. We preferred to retain our original note. Then again, many times, a renewal of a note was not made because there would be an endorser and the endorser would be outside or he might be in the Iditarod or some other district" (pp. 565-566).

John L. McGinn testified as follows:

"Q. State briefly what was the declared practice of the bank with reference to making loans and pressing the collection of them promptly at maturity or otherwise; what the policy was?

"A. It was the custom of the Fairbanks Banking Company, as well as the other banks, for instance if a man had a piece of ground out there and put down a shaft and struck pay and he would want to get money, they would send a man out to investigate and see what he had. If they thought that the prospect or the showing that the ground had made was sufficient to warrant them in making a loan, they would do so, and they would carry that man according to the conditions that arose in each particular case. It was a matter that they had to exercise judgment about. You could not lay down any fixed rule in regard to when that note should be collected, or how long it should be allowed to run. The banks always took—that is true of all the banks—ample security at the time they made the loan. Whenever they advanced any money upon a piece of mining ground, they thought that ground would produce the money (pp. 928-929).

"Q. How was that ascertained; from the prospects of the ground?

"A. Take the Fairbanks Banking Company. One of the ideas in having directors from the various creeks, like Jesson on Ester, Yarnell on Dome. I know this was talked of at the stockholders' meeting. Bob Sheppard on Fairbanks Creek, McMullen out on Goldstream, Charley Robinson was operating on Vault Creek at that time. One of the conditions was that if any miner from any of those creeks came in and required a loan, then they would telephone out to one of these directors and have them go down and examine the ground; and in case they didn't have a director upon the creek, then they would send a man out. Originally they had men employed for that purpose. I have known Tom Carroll to

be employed to pass on property on Dome Creek, and other men.

"Q. The directors were chosen with a view to their knowledge of the mining industry?

"A. Yes, sir.

"Q. And their competency to judge of the value of the ground?

"A. Yes, sir, that was taken into consideration.

"Q. And they were frequently consulted by the bank's officers with reference to the collection of past due paper?

"A. Oh, yes.

"Q. And the question. of the advisability of what course and policy to pursue?

"A. Yes, sir.

"Q. Now, from your knowledge of the situation, your experience as an attorney and as one of the directors, do you say the directors exercised good judgment in refusing to press claims immediately when they became due?

"A. I think so" (pp. 929-930).

It does not appear what if any effort was made by the Receiver to collect any of this past due paper. The testimony is that it is still in his hands and uncollected, but nowhere does it appear that he has taken any active steps to enforce payment of these various obligations. It is a well-recognized fact that the closing of any business, particularly by bankruptcy, is ruinous as far as the value of the accounts owing is concerned. Apart from the fact that no further favors are to be received from the institution, and thereby the motive to maintain an unimpaired credit with it is removed, is the fact that the money

instead of being owed to the person from whom it is borrowed, is now owed to a number of creditors of the bankrupt with whom its debtors have no personal relation.

We submit that the directors were entitled to treat all of the assets as worth their book value, not excepting the Gold Bar stock and the Tanana note which we shall now proceed to consider.

X.

THE DIRECTORS WERE ENTITLED TO TAKE THE GOLD BAR STOCK AT ITS BOOK VALUE.

In its opinion the Court said:

> "the stock of the Gold Bar Lumber Company was still carried for the same amount as when taken over by the partnership, more than two years before, although no dividends whatever had been paid thereon, and a large amount of the standing timber upon the lands of that company had been cut, turned into lumber and sold, and the proceeds either used up in expenses or in maintaining and enlarging the equipment of the plant. The evidence as to the actual value of the assets of the corporation at this time is scarcely sufficient to form a basis of an accurate calculation. The testimony, however, does show that the value of the Gold Bar stock was less than it was in 1907 or 1908" (p. 1231).

At another point of the opinion the Court states:

> "nor has the evidence shown that the valuation placed upon the stock of the Gold Bar Lumber

> Company was shown to be excessive, or that the directors had any good reason to believe that it was excessive. There has been considerable evidence produced concerning the value of this stock at various times, from the time it was purchased by the partnership in 1906 to the present time, but the only evidence that can be really considered as reliable, as showing its market value, is that during the present year [1914] it was sold at public sale in Seattle for the sum of $100,000.00. The uncertainty of the evidence concerning its value is clearly apparent from the testimony of the officer of the bank making this purchase, given shortly after the sale was made, to the effect that he then considered it worth $300,000.00" (p. 1213).

The evidence shows that at the very first meeting of the board of directors the following resolution was adopted:

> "Resolved, that the board of directors obtain from Dexter Horton Company of Seattle, Washington, an estimate of the total value of the Gold Bar property. Carried" (p. 225).

M. W. Peterson testified that he was the cashier of the Dexter Horton National Bank of Seattle, Washington; that he received a telegram from the Fairbanks Banking Company as follows:

> "Please advise by telegraph at the earliest possibility last reliable report of valuation Gold Bar property. What is opinion of yourselves regarding property?" (Trans., p. 523).

He made an investigation of the reasonable, fair value of the Gold Bar property and replied to the Fairbanks Banking Company that he believed it could be sold for $425,000,000 (p. 526). This was in March, 1908.

His full report was as follows:

"Fairbanks Banking Co.,
"Fairbanks, Alaska.

"Gentlemen:

"We duly received your telegram of the 14th inst. as follows:

"'Please advise by telegraph at the earliest possibility last reliable report of valuation Gold Bar property. What is the opinion of yourselves regarding property? Wood will explain what we mean by Gold Bar property.'

"On receipt of your telegram we immediately secured what information we could concerning the Gold Bar Lumber Co., including a statement made by that company dated Oct. 12/07. We later secured from Mr. Armstrong, Manager and Treasurer of the company, an itemized statement of Mar. 1st 08, together with a copy of the company's trial balance of that date.

"We have made a careful examination of the statement, and taking it for granted that the figures in the statement are approximately correct, we have arrived at the conclusion that the company is in excellent financial condition considering the present financial and business conditions prevailing throughout the country. After eliminating all resources with the exception of camp equipment, lumber and logs on hand, mill plant, cash, real estate, merchandise in store and accounts receivable, and with these above-mentioned

resources conservatively reduced in amount, and estimating the timber of the company worth $300,000, we find that for the purpose of arriving at a basis on which a credit for the company could be figured, it has total resources of $450,000.00 against liabilities of $75,000.00 showing a net worth of $375,000.00. This, of course, is not the figure at which the property would be valued in the event of a sale, but is merely the valuation that we as Bankers would give the property were we considering a loan on it.

"According to the statement furnished us by Mr. Armstrong, the gross resources of the company amount to $526,000.00, which we believe to be a conservative valuation as we are informed that a reasonable amount is charged off each year for depreciation. We have therefore telegraphed to you as follows:

" 'In reply to your telegram of Saturday, property is worth in our opinion $375,000.00 for a firm basis of credit. Believe it can be sold for more than $425,000.00. Opinion is based upon statement March 1st and independent investigation.'

"We do not know for what purpose our opinion on this property is wanted, but we have been as fair as possible in making the above estimates, and trust that our opinion will be of some service.

"Yours very truly,

"Cashier" (pp. 990-992).

At the time of the trial, Peterson valued the property at $300,000, and stated that in 1908 and 1910 its value was greater (p. 528).

R. C. Wood testified:

"Q. I will ask you to state whether or not at that time [the time of the transfer] you believed that Gold Bar was worth the sum of $341,949?

"A. We had no reason to believe any other way. We were submitted statements by the manager of the Gold Bar Lumber Company every month. Captain Barnette had come in from the outside with glowing reports of the concern. He said the timber was increasing in the neighborhood all the time.

"Q. That it was increasing in the neighborhood?

"A. That the value of timber was increasing in the neighborhood.

"Q. You had received communications from outside people, too, had you, in regard to it?

"A. Yes, sir. We had received communications from Dexter-Horton Company; and I think the National Bank of Commerce advanced credits against Gold Bar in excess of $300,000" (pp. 727-728).

J. S. MacKenzie, who had been foreman, superintendent and the manager of the Gold Bar Company sawmill, testified that the net resources of the Gold Bar Lumber Company on October 1st, 1908, were $438,164.71 (p. 486), and that they were about the same in March, 1908. This valuation included 150,000,000 feet of timber, at $2.00 a thousand (p. 484). This was based on a cruise that was made, and it was the experience of the company that the timber ran ahead of the cruise about twelve and one-half per cent. (12½%). (p. 494.)

The value which the board itself placed upon the property was shown by the minutes of the meeting of the board of directors of the Fairbanks Banking Company held upon the 12th day of April, 1909.

> "Discussion as to the advisability of selling the Gold Bar property was had in full and it was the sense of the meeting that the same be sold for $450,000, with $100,000 cash payment, and the balance payments at $50,000 every three months until paid. The officers were instructed to so advise Mr. Armstrong, manager, and advise also that it is desirable that he place the property in the hands of a responsible timber land agent for disposal."

and by the minutes of the meeting of directors of August 12, 1909:

> "A communication from Gold Bar Lumber Company dated July 24, 1909, enclosing monthly report of June, was read and ordered filed. A telegram from the same company, under date August 12, 1909, referring to sale of Gold Bar property and asking for price and terms was read and ordered filed. The board discussed the Gold Bar Lumber Company's affairs quite fully and decided upon the price and terms as follows: $340,000 for our undivided four-fifths interest in the property on the following terms,—$50,000 down, and the balance in $25,000 payments every 60 days until paid, bearing interest at the rate of six per cent. per annum. This offer to be made on condition that it be accepted within thirty days" (pp. 729-731).

We submit that the evidence is insufficient for the Court to find that this property was worth any less at the time of the declaration of the dividend, than the amount at which it was carried on the books. The only witness who testified to this effect was Mr. Johanson, and when he was asked "What was the value of the capital stock of the Gold Bar Lumber Company in March, 1908?" he answered, "Well, if I was to have sold Gold Bar at that time I was figuring on a basis of about the original purchase price plus interest from the time we bought to the time of selling. However, I would not state that to be the actual value, because I was a minority stockholder and what I would have sold out for would not have probably fixed the value" (p. 311). After considerable prodding by the plaintiff's attorney, he testified that the fair, reasonable value to be placed on the property in March, 1908, was the original purchase price, plus interest from the time it was bought up to that time (p. 312). And that was the same basis at which he arrived at the value on June 30, 1908 (p. 327). This property was necessarily of a fluctuating value, being directly affected by the condition of the lumber market (p. 329).

His reply, "the original purchase price plus interest," showed plainly that what he meant by value was book value, and the price at which the property should be carried on the books, or as it were, the invoice value.

His real opinion, however, is shown by his letter of Oct. 13, 1913 (p. 530) and the accompanying statement (p. 995) in which he shows the net value of the property in that year to be $344,941.92 after charging off bad accounts and depreciation.

In passing we may comment on the fact that while this witness is the only one to testify that the value of Gold Bar fell off each year, his method of fixing the value, viz., "on original purchase price plus interest" would have given it an increasing value as time went on.

Last but not least the directors were furnished with the annual statements of the Gold Bar Lumber Co. (pp. 996 *et seq.*) which showed net resources as follows:

Oct. 1, 1908—$438,164.71 (p. 998).

Oct. 1, 1909—$438,754.61 (p. 999).

Oct. 1, 1910—$449,471.41 (p. 997).

They were not directors of the Gold Bar Lumber Co. and were entitled to receive these statements as true reports of the conditions of that company.

XI.

THE DIRECTORS WERE ENTITLED TO TREAT THE TANANA NOTES AS WORTH THE AMOUNT AT WHICH THE BANK CARRIED THEM.

In this particular, the Court found as follows:

> "That of said notes so past due as aforesaid there were two executed by the Tanana Electric Company in the sum of $27,997.38 which depended for their value upon the existence of an alleged guaranty of the Scandinavian-American Bank to make advancements sufficient to cover the same; that said alleged guaranty never had any existence in fact, and the claim therefor had been repudiated by said Scandinavian-American Bank prior to the time said note was accepted by said board of directors, and said repudiation was known to the members of said board. That said notes are still unpaid, and the same was at all times carried on the books of the said Washington-Alaska Bank, formerly Fairbanks Banking Company, as an asset in the sum of $27,997.38" (Assignment of Error No. 23, p. 199).

And its opinion on this subject was as follows:

> "It appears, moreover, that during all this time the bank was carrying a large amount of paper long past due; and while the directors may in fact have relied upon the statements of the officers of the bank, and the reports made by them as showing the true condition of the bank's affairs, it would seem that reasonable diligence on their part would have revealed that among these assets were many of so doubtful a character as to require their deduction from the assets of the bank. This

is particularly true of the note of the Tanana Electric Company, dated December 16, 1907, for the sum of $27,997.38, the maker of which was in the hands of a receiver, and in a hopelessly insolvent condition. And while it was in evidence that the original incorporators had relied upon some alleged guarantee of this amount by either J. E. Chilberg or the Scandinavian-American Bank of Seattle, it was well known that this guarantee had been repudiated by them, and that any attempt at collection from them would be strenuously resisted" (p. 1129).

The testimony showed that Mr. Chilberg, who was the Vice-President of the Scandinavian-American Bank of Seattle, made an arrangement with the Fairbanks Banking Company to advance money to the Tanana Electric Company. The testimony of James W. Hill was quite explicit on the subject:

"Q. Now, I wish you would go on and state in your own way what you know in reference to this Tanana Electric Company loan.

"A. In the summer of 1906 Mr. J. E. Chilberg, vice-president of the Scandinavian-American Bank, came to Fairbanks. One of the objects of his visit was to finance, or help finance, the Tanana Electric Company, which was then operating on Cleary Creek, at the mouth of Cleary Creek. They were then operating with a small plant, and of course their power was limited. Mr. Chilberg had some plans for the installation of water power by turbines, and he wanted to get some local people interested in the project along with the people who had subscribed for stock in Seattle, and he circulated a subscription list among some of the people whom he was acquainted with

here, with the result that some $40,000 was subscribed—$70,000 worth of stock was subscribed, to be paid for at a certain given date. One of the conditions of the subscription was that the Scandinavian-American Bank would advance the sum of $100,000 for the installation of this power plant—water power plant. The Tanana Electric Company were to give a first mortgage to the Scandinavian-American Bank for $100,000, which was subsequently done and the mortgage sent out to Seattle. At the time that these subscriptions fell due, the local subscribers paid in something like $40,000 in cash, which was remitted to the Scandinavian-American Bank or to Mr. Chilberg at Seattle.

"Q. Who was that paid to?

"A. I think it was paid into the bank.

"Q. And by the bank—

"A. And by the bank remitted to Seattle. The balance of that subscription was the subscription of Mr. Volney Richmond, for which I understood he gave a note to Mr. Chilberg. Anyway, it was a personal transaction between them, as to how he should pay for his stock. The other $5,000 I think was a subscription of Mr. Chilberg himself, in addition to what he had originally subscribed. After the mortgage had been prepared and sent out, the Scandinavian-American Bank or Mr. Chilberg transferred a credit to the Fairbanks Banking Company of $18,500.

"Q. Why did they transfer that? What was the arrangement between Chilberg and the bank in regard to the bank advancing any money?

"A. I testified the other day that there was some document in existence at that time in the nature of an authority for the bank to advance that money and be reimbursed by the Scandinavian-

American Bank until the full amount of the mortgage had been disbursed.

"Q. What was the arrangement in regard to when the bank was to be paid for these advancements?

"A. From time to time.

"Q. State what the arrangement was.

"A. I don't remember the exact wording of this document.

"Q. I don't care about the document, but the understanding between you outside of the document.

"A. The understanding, you mean, between Chilberg and the Fairbanks Banking Company?

"Q. Yes.

"A. This document I have in my mind at the present time was signed by Mr. Chilberg as vice-president of the Scandinavian-American Bank. The officers of the bank never felt for one moment that they were advancing the money to the Tanana Electric Company on the credit of the Tanana Electric Company, but were making advances to the Tanana Electric Company for which they would be reimbursed by the Scandinavian-American Bank from time to time.

"Q. What was the understanding as to how these advances should be made, and how you were to be credited?

"A. We were to telegraph the Scandinavian-American Bank from time to time as money was required, and they would in turn credit bank account.

"Q. When money was required by whom?

"A. When money would be required by the Tanana Electric Company to pay their pay checks.

"Q. Did you advance them the money here, and then telegraph to them that you had done it?

"A. Yes, sir.

"Q. State what the arrangements were and what you did in that respect?

"A. I don't know that we had advanced the full amount of $18,500 that we telegraphed for the first time, but we had advanced a good portion of it. The books will show exactly what had been advanced. You know I am testifying from memory as to matters that happened seven years ago, and I have not referred to the books before going on the stand. My recollection is that we had advanced the major portion of $18,500.00 before we telegraphed to the bank for that amount of credit to our account, which they credited to our account, but instructed us to send a note for that amount. That amount was exhausted immediately and we commenced to advance more money until we had advanced some $25,000, at which time we again telegraphed, and received a credit. Then, subsequently, we kept on paying pay checks right along, and felt that we were absolutely secure. And in the fall, along towards the end of September, Mr. Richmond went outside with the understanding with the bank—I heard him talking with Mr. Wood—that as soon as he got to Seattle he would arrange with Mr. Chilberg to apply the whole balance of the $100,000 to our credit and have it telegraphed into Fairbanks to reimburse the bank for what they were advancing in the meantime. He knew we were paying those checks right along—and that this balance of that money so transferred would reimburse the bank for what they had advanced up to that time and take care of any future demands in connection with the work.

"Q. What position did Mr. Richmond occupy?

"A. He was manager of the Tanana Electric Company.

"Q. Did you receive any word from Mr. Richmond?

"A. I didn't receive any word direct, but I saw a telegram from Mr. Richmond.

"Q. To whom?

"A. To Mr. Wilson, who was their secretary at that time. He brought it over to the bank and showed it to me.

"Q. What were the contents of that telegram?

"A. It was to the effect that Chilberg was absent in the East and was expected to return in ten days or two weeks, at which time the matter would be arranged; and that Richmond was leaving that night for San Francisco.

"Q. Arrangements in reference to this advance of money?

"A. Exactly. So we kept on advancing money until the amount reached approximately $30,000, and I figured that by that time we should have heard from Mr. Chilberg; that the time had elapsed so that he should be back in Seattle, and I knew that there was a financial flurry threatening on the outside, and I telegraphed Chilberg that the advances to the Tanana Electric Company, up to that time were so much, and asked that he credit the account of the bank, and telegraph us; furthermore, in my message I think I said that unless that credit were placed immediately we would have to discontinue making, or paying any more checks of the Tanana Electric Company. He came back with a wire, which I believe is in evidence, that we should make no further advances to the Tanana Electric Company, which telegram was followed up with a letter explaining financial conditions on the outside.

"Q. Then what did the bank do in the way of obtaining any paper?

"A. At that time, we had never taken any notes

from the Tanana Electric Company until telegraphed to do so by the Scandinavian-American Bank; we simply carried the account as an overdraft, and when that credit was transferred by telegraph, we charged the Scandinavian-American Bank and credited the checking account of the Tanana Electric Company. But at that time when Chilberg wired back to make no further advances, or on or about that time, this Tanana Electric Company showed an overdraft of about $30,000, and as I remember, I went upstairs and consulted you in regard to the matter, and you advised me that I take a note.

"Q. Take the note of whom?

"A. From the officers of the Tanana Electric Company here, Mr. Claypool and Mr. Wilson, which I did, because we were not in the habit of carrying any large overdrafts.

"Q. Those are the notes that you subsequently carried in the bank?

"A. Those are the notes that we subsequently carried in the bank, and we expected the Scandinavian-American Bank to pay it.

"Q. I will ask you if in March, 1908, you regarded that as a good claim against the Scandinavian-American Bank?

"A. I did.

"Q. How would you regard that claim in April, 1910?

"A. I would say that at that time it was still good.

"Q. Do you know whether or not the Scandinavian-American Bank had advanced against this?

"A. Yes. They took care of some of our drafts at that time which were being presented in Seattle to the amount I think of some $10,000, which account was carried on the books I think up until

the time I left; in other words, we owed the Scandinavian-American Bank on our books, as against that credit, some $10,000.

"Q. Did the Scandinavian-American Bank ever make any demand for that $10,000?

"A. Not to my knowledge. I might say further that in connection with this Tanana Electric Company, in the fall of—early spring of 1909, Mr. Claypool went outside to Seattle and took with him all the data that we could give him at that time, with the idea that he was going to force the Scandinavian-American Bank to come through with the balance of that mortgage.

"Q. Do you know whether or not he had this order or guaranty?

"A. I think Mr. Claypool had it at that time. I am reasonably sure I saw it in his office one time.

"Q. Is that the last you have ever seen of it?

"A. Yes.

"Q. You testified Mr. Claypool was an attorney?

"A. Yes, sir.

"Q. Did you ever hear him express an opinion as to whether that guaranty was binding upon the Scandinavian-American Bank?

"A. Not only Mr. Claypool, but the trustees. There were several other trustees of the Tanana Electric Company in town here, and they thought at all times that we were absolutely secure and protected on those advances (pp. 788-795).

"MR. RIDER—Q. Was it explained by you or by Captain Barnette to the depositors' committee that you had such communication from the Scandinavian-American Bank?

"A. Everything was shown to the committee.

"Q. You showed that to the depositors' committee?

"A. Yes, sir.

"Q. Showing that the Scandinavian-American Bank had repudiated the guaranty?

"A. I wouldn't say that they had repudiated the guaranty. They had simply said they would make no further advances on account of the financial condition at that time.

"Q. This is the correspondence that was shown to the depositors' committee?

"A. It must have been. The whole circumstances of that was gone into in detail.

"Q. In connection with that, you say there was also shown to the depositors' committee some instrument in writing, and you say the last you saw of it was in the possession of Mr. Claypool?

"A. Yes.

"Q. It was also shown?

"A. Yes, sir.

"Q. And it was known to the depositors' committee that this account was in dispute, and the liability of the Scandinavian-American Bank was in dispute?

"A. No. I wouldn't say that the liability of the Scandinavian-American Bank was ever in dispute, nor did the depositors' committee think so.

"Q. Do you mean that; 'ever in dispute'?

"A. At that time certainly not.

"Q. It did become a matter of pretty serious dispute?

"A. It might have. But at that time there was no question in my mind, nor in the minds of the depositors' committee, but that that was a legal obligation and one that would be taken care of by the Scandinavian-American Bank.

"Q. You had absolutely no doubt of that in your mind?

"A. In fact, to go back a little. When Mr. Wood was in Seattle Mr. Chilberg promised to make that credit to our account, but subsequently

declined, stating he couldn't do it then; that the directors had shut down absolutely on all loans.

"Q. While Wood was there he did get that promise out of Chilberg?

"A. Yes, sir, and he so wired us.

"Q. And the next day he wired that Chilberg had declined to deal with you?

"A. Yes, sir" (pp. 816-817).

R. C. Wood testified as follows:

"Q. What arrangement, if any, was made by Mr. Chilberg to have the Scandinavian-American Bank and the Fairbanks Banking Company advance money to the Tanana Electric Company?

"A. Mr. Chilberg left an order to the effect; for the Fairbanks Banking Company to advance money from time to time to the Tanana Electric Company as they needed it, and that the Scandinavian-American Bank would transfer credits from time to time to take up the advances that were made by the Fairbanks Banking Company.

"Q. Just state what the Fairbanks Banking Company did in pursuance to that.

"A. As soon as Mr. Hutchinson was sent in here by Mr. Chilberg—He was manager of the Tanana Electric Company, and in installing this water plant and moving the machinery and the plant it took a great deal of money, and Mr. Hutchinson drew checks on the Fairbanks Banking Company on Fairbanks, also on their branch bank at Cleary, and, when this amount reached the sum of $18,500, the Fairbanks Banking Company telegraphed Mr. Chilberg or the Scandinavian-American Bank, and he wired back a credit for them. Then they kept on advancing this money until they had reached another sum of $25,000, and the bank wired them about that, and he wired

a credit for that. They then continued making these advances until the fall of 1907 when the amount reached approximately $30,000. At this time Mr. Richmond—or before this time in the fall, on the last boats, Mr. Richmond went to Seattle. He was manager of the Tanana Electric Company at that time. He told us before he left —I believe a note was executed by the Tanana Electric Company in favor of the Scandinavian-American Bank for the sum of $56,500, or it might have been more, but it was to take up the balance due on the mortgage, and credit was to be transferred from Seattle to the Fairbanks Banking Company. This amount reached $30,000, and, when Mr. Richmond arrived in Seattle, he wired to Mr. Wilson, who was the secretary of the Tanana Electric Company, that Chilberg was in New York, and that matters would be arranged upon his return. The bank then later on wired Mr. Chilberg that they had made these advances, and requested him to telegraph a credit. In answer to that, Chilberg wired back to advance nothing more to the Tanana Electric Company. In the meantime Chilberg, or the Scandinavian-American Bank, had advanced, as near as I can remember, to the Fairbanks Banking Company against this credit possibly ten or eleven thousand dollars (pp. 718-720).

"Q. Now, you went out in November, 1907?

"A. Yes. I went out in November, 1907.

"Q. What steps, if any, did you take toward securing the collection of this amount?

"A. Well, I went first to Mr. Wolfolk, who was assistant cashier of the Scandinavian-American Bank, and asked him if Mr. Chilberg had put through the credit to the Fairbanks Banking Company. He said no, he had not, but he expected he would; that advances had been made against

some drafts that had come in, and he said he was anxious to have the credit go through so he could know where the credit was, as drafts of the Fairbanks Banking Company were being presented to him and he didn't know what to do with them. I took the matter up with Mr. Chilberg, and he said that, owing to conditions that existed at that time, and the panic that was on, it was impossible for him to advance the credit at that time. He said that if I cared to, I could go before the board of directors of the Scandinavian-American Bank.

"Q. What did he say in regard to the payment, or knowledge of the payment?

"A. He simply said he was not in a position to pay it. *He never disputed the amount in any way.* And when I appeared before the directors of the Scandinavian-American Bank and told them all about it, they said: Everything is up in the air, and the Miners & Merchants Bank of Nome has drawn against us for $700,000, and this panic going on, we can't listen to any proposition of that kind at present.

"Q. Did you place the matter in the hands of an attorney there?

"A. Yes. We were anxious to have these outstanding drafts paid at that time, and I went to Kerr & McCord.

"Q. Did you lay the matter before them?

"A. Yes.

"Q. What did they advise you?

"A. Mr. McCord and I went down and had a talk with Chilberg in his office in the Scandinavian-American Bank, and the only satisfacton we could get out of them was that he was not in a position to pay the money. McCord said: 'The Fairbanks Banking Company needs this money to pay these drafts, and, unless you can pay them, we

will start suit tomorrow.' Chilberg didn't say anything, and we walked out of the office.

"Q. What did Mr. McCord, after you put the facts before him, advise you as to the probability of collecting this money?

"A. He said there would be absolutely no question of recovering it (pp. 720-722).

"Q. I will ask you whether or not in April, 1910, knowing the facts as you did, and the advice you received, you believed this was a good and valid claim existing against the Scandinavian-American Bank?

"A. I considered it just as good then as I did in 1908 (pp. 722-723).

Dr. W. G. Cassels was the Chairman of the Depositors' Committee which examined the assets of the Fairbanks Banking Company. He testified as follows:

"Q. Did you regard the note of the Tanana Electric Company which was examined by you and reported on, as of value?

"A. Not of value as regards the paper of the electric company, but a *letter was presented at that time* by the bank which convinced me that the advances to the electric company had been authorized by the Scandinavian-American Bank of Seattle, and it was really their credit that was in question.

"Q. By whom was this letter presented, Doctor?

"A. I believe that the letter was presented by Mr. Dusenbury, or Mr. Hill, but I believe by Mr. Hill—those were the only two that handled the papers.

"Q. Was any investigation made by your committee to determine the value of the Tanana Electric Company note?

"A. There was some discussion by the com-

mittee. It was, as I remember, referred to Mr. Claypool as the only attorney sitting at the board, and he believed that the letter or papers presented by the bank was sufficient to hold the Scandinavian-American Bank as security for the debt" (pp. 282-283).

From the foregoing testimony it is clear that if this testimony was true, there was a legal liability on the part of the Scandinavian-American Bank to pay the Tanana Electric Company notes; nor does it appear that the bank ever repudiated its liability to the Fairbanks Banking Company. At the time the financial panic occurred, when every bank in the United States went on a clearing house basis, the Scandinavian-American Bank was very much exercised at the situation. The records show a long letter from Mr. Chilberg to the Fairbanks Banking Company (p. 258), in which he describes the condition of affairs and then says:

"This situation compels an actual cessation of all loans or advances of any kind, *whether they have been arranged for before or not,* and it will necessitate the discontinuance of advances to the Tanana Electric Company on their mortgage" (p. 260).

The following day he telegraphed to the Fairbanks Banking Company,

"Advance nothing more Tanana Electric Company."

From the nature of the whole transaction, it is perfectly evident that the advances which the Fairbanks Banking Company was making, were being made on the faith of their repayment by the Scandinavian-American Bank. A course of business which had been established, had continued long enough to warrant a reliance upon its continuation, even had there been no written guaranty, and the guaranty was never repudiated. The very fact that the telegram from Chilberg on November 9th, 1907, said "Advance nothing further to Tanana Electric Company," was evidence that the advances previously made were made under his direction. The fact that the Scandinavian-American Bank was at that time a creditor of the Fairbanks Banking Company to the amount of over $10,000.00, which it made no effort to collect, showed that there was somewhere a knowledge on its part that it was not safe for it to demand this $10,000.00, for it would inevitably be met with the counter-demand for the $27,000.00.

At the time the Fairbanks Banking Company took over the assets of the partnership, all of these facts were gone into, as Dr. Cassels testified, and in the face of the knowledge of all of these conditions the depositors' committee appraised the notes at their face value. They were carried on the books at their face value at the time of the declaration of the dividend on April 12th, 1910. There was nothing fraudulent on the part of any of the directors in this. If in fact

there was a liability on the part of the Scandinavian-American Bank to pay this money, and the Scandinavian-American Bank was solvent, the Fairbanks Banking Company was entitled to carry this asset at its face value, even though convinced that the Scandinavian-American Bank would seek to evade the payment. What items are to be written off as worthless, what items are to be reduced as depreciated, and what items are to be carried at their full value, is very frequently a matter upon which experts may differ.

XII.

THE DIRECTORS DID AS A MATTER OF FACT ACTUALLY BELIEVE THE BANK WAS SOLVENT AND POSSESSED A SURPLUS ON APRIL 12, 1910, AT THE TI E THE DIVIDFND WAS DECLARED.

John A. Clark testified:

"Q. At the meeting of October 12, 1910, I will ask you whether there was a statement presented to the directors as to the condition of the bank on that day?

"A. My recollection is that there was, and I think a copy is filed in the minutes—filed with the minutes of that day.

"Q. I will ask you to state whether or not at that time you believed that the Fairbanks Banking Company was in good shape?

"A. I certainly did.

"Q. And solvent?

"A. I certainly considered it solvent at that time.

"Q. State whether or not you believed that its assets exceeded its liabilities, and included in its liabilities its capital stock?

"A. I did.

"Q. The condition of the Washington-Alaska Bank of October 11, 1910. State what that shows as to what the interest, exchange and undivided profits were at that time?

"A. It shows here $51,576.29.

"Q. From that statement, as a director what were you led to believe?

"A. I believed that that was the undivided profits and the interest and exchange.

"Q. I think it also says that that was in connection with some gold shipment?

"A. I think I understood it was in connection with profits that were anticipated on gold shipments, or something of that kind.

"Q. Did you believe at that time that these were the profits over the liabilities?

"A. Yes, sir" (pp. 892-893).

John L. McGinn testified:

"Q. Now, as to the condition of the bank April 12, 1910, I will ask you to state whether you believed the bank at that time to be solvent?

"A. Absolutely. Yes, sir.

"Q. I will ask you to state how you showed your confidence in that behalf?

"A. Well, I had about in the neighborhood of $64,000 on deposit there at that time.

"Q. Did you keep it on deposit there for some time afterwards?

"A. I kept it on deposit there until we purchased the First National Bank.

"Q. And prior to that time had you considerable sums on deposit?

"A. Yes, sir. I had more on deposit a short time before that.

"Q. More than $60,000?

"A. Yes. I have had thirty-four and thirty-five thousand dollars more.

"Q. Can you state from memory the names of those directors who had large sums on deposit at that time?

"A. Dave Yarnell had about $140,000, and the Jessons as I understood in the neighborhood of $88,000" (p. 927).

R. C. Wood testified:

"MR. McGINN—Q. How much did E. T. Barnette have on deposit at that time [April 12, 1910]?

"A. He had about $292,000.

"Q. Would that include his special deposit of $200,000?

"A. Yes, sir" (p. 728).

The evidence shows that Barnette, the Jessons, McGinn and Yarnell had on deposit at the time of the declaration of the dividend, deposits aggregating more than half the total deposits of the bank (p. 385).

XIII.

THE PLAINTIFF MUST SHOW THAT HE REPRESENTS CREDITORS, WHO WERE SUCH AT THE TIME THE DIVIDEND WAS DECLARED AND THE STOCK PURCHASED.

Defendants assigned as error the refusal of the Court to make the following finding:

> "That it has not been shown that the creditors who were existing at the time of the surrender of said stock and the cancellation thereon as hereinbefore set forth have not been paid in full by the Washington-Alaska Bank of Nevada, save and except that on July 1, 1908, were existing creditors, who have not since been paid in full, to the amount of $4,000, and of said sum one-half thereof has since been paid by the receiver" (Assignment No. 34).

This proposed finding is in accordance with the uncontradicted evidence of the witness Wood (p. 1048).

As a general rule, in case a corporation purchases its own stock, paying therefor with corporate assets, subsequent creditors cannot be regarded as prejudicially affected.

Pabst v. *Goodrich,* 133 Wis., 43; 113 N. W., 398, 14 Ann. Cas., 824;

Atlanta, etc. Ass'n. v. *Smith,* 141 Wis., 377, 123 N. W., 106, 135 A. S. R., 42, 32 L. R. A. (N. S.), 137;

Note: 17 Ann. Cas., 1263;

7 *Ruling Case Law.,* page 530.

It is a well-settled principle that subsequent creditors cannot be heard to impeach an executed contract, where their dealings with the company from whom they claim the benefit occurred after the contract became an executed contract.

Porter v. *Pittsburg,* 120 U. S., 649;
Graham v. *Railroad Co.,* 102 U. S., 148;
Rollins v. *Shaver Wagon Co.,* 20 A. S. R., 428.

Even if the transaction is, in fact, fraudulent, creditors whose claims were created subsequently could not complain of it.

Fifield v. *Gaston,* 12 Ia., 221;
Whitescarver v. *Bonney,* 9 Ia., 484.

The complaint alleges the insolvency of the bank at the time the stock was taken over and the dividend paid, but it fails to state that at the said time there were any existing creditors of said bank, and fails to state that any then existing creditors of said bank have not been paid.

> "Creditors whose debts were contracted subsequent to the reduction (of capital stock) can only look to the capital stock as reduced, for security."

1 *Cook on Corporations,* 289.

and

> " 'Corporate creditors' who become such after the reduction of the capital stock has been made,

cannot complain that such reduction was irregularly made and that the holders of the cancelled stock are consequently still liable."

1 *Cook on Corporations,* 289;
Hepburn v. *Exchange,* 4 La. Ann., 87;
Palfrey v. *Paulding,* 7 La. Ann., 363;
Cooper v. *Fredericks,* 9th Ala., 738;
Re State Ins. Co., 14 Fed., 28;
Gade v. *Forrest,* 163 Ill., 367;
46 N. E., 286.

The rule that the property of a corporation is deemed a trust fund for creditors, is wholly a creation of the courts of equity, and only those having equitable rights in the fund at the time of its depletion have a right to resort to such fund to satisfy their claims. "Creditors of the corporation are not presumed to have relied upon the property of their debtor which it did not possess when the indebtedness accrued, and are therefore not held to have an equitable claim therein."

Marvin v. *Anderson,* 87 N. W., 226.

The case of *McDonald* v. *Dewey,* decided by the Supreme Court of the United States and reported in 202 U. S., page 510, was a suit instituted by the receiver of the First National Bank of Orleans, Nebraska, to enforce an assessment of $86.00 a share on 105 shares of stock of said National Bank, the said

assessment having been made upon May 20th, 1897. It was claimed that Charles Dewey, who was the original owner of said 105 shares of stock, sold the same in 1894, at a time when the bank was insolvent, to a person whom he knew to be irresponsible, and it was claimed by the receiver that this was in fraud of the rights of creditors. The Court in this case laid down the rule, that in the event of the insolvency of the bank at the time said shares were transferred, it was only existing creditors who can claim to have been damnified by the fraudulent transfer of the shares, and as to them, such transfer is voidable. That subsequent creditors were apprised by the published report as to whom transfers had been made and of the persons to whom they had recourse for double liability. The Court saying:

> "the injustice of holding a stockholder liable for an indefinite time in the future, to creditors who may have become such years after he had parted with the stock, and who were apprised of the *name of the stockholder by the published list,* is too manifest to require an extended comment. We are only applying to this case by analogy, the ordinary rule of common law that a voluntary deed by a person heavily indebted, is fraudulent and void as to prior creditors merely upon the ground that he was so indebted, but that as to subsequent creditors is only void upon the evidence that the deed was made in contemplation of future indebtedness."

And the Court at the end of the opinion says:

"There are undoubtedly cases in which we have used the general expression that in the event of a fraudulent transfer of stock, the stockholders remain liable to the creditors of the bank, but in none of them were we called upon to discriminate between existing and subsequent creditors, since the rule of the insolvency of the bank followed soon after the transfer, and the distinction was not called to our attention by counsel."

It is provided by the Alaska law:

"Sec. 654. All corporations or joint stock companies organized under the laws of the United States, or the laws of any State or Territory of the United States, shall, before doing business within the District, file in the office of the secretary of the District and in the office of the clerk of the district court for the division wherein they intend to carry on business, a duly authenticated copy of their charter or articles of incorporation, and also a statement, verified by the oath of the president and secretary of such corporation, and attested by a majority of its board of directors, showing—

"(1) The name of such corporation and the location of its principal office or place of business without the District; and, if it is to have any place of business or principal office within the District, the location thereof;

"(2) *The amount of capital stock;*

"(3) *The amount of its capital stock actually paid in in money;*

"(4) *The amount of its capital stock paid in in any other way, and in what;*

"(5) The amount of the assets of the corporation, and of what the assets consist, with the actual cash value thereof;

"(6) The liabilities of such corporation, and if any of its indebtedness is secured, how secured, and upon what property."

Compiled Laws of Alaska (C. C.), Sec. 654, p. 329;
Carter Code, Sec. 255.

And it is further provided by Section 658 of the compiled laws (*Carter Code,* Sec. 229) that a similar statement shall be filed annually.

The evidence shows that from time to time as required by the foregoing law the bank filed and caused to be filed with the clerk of the United States District Court at Fairbanks, Alaska, statements showing the amount of the outstanding capital stock of said corporation.

The defendants requested findings upon this subject (Assignments 38, 39 and 40).

These statements were notice to the creditors of any reduction of the capital stock which had been made.

There must be some purpose which the law intended to be subserved by requiring foreign corporations to publish the amount of their outstanding stock and it can be nothing other than that persons contemplating becoming creditors of the corporation may know to what assets they may have recourse.

Any person becoming a creditor after any surrender

of stock took place, had certainly no right to complain because any fund to which he might deem himself entitled to look was depleted. And this would be more emphatically the case when public notice had been given as required by law of the fact that such depletion had taken place.

It is manifest from the authorities and also upon principle, that the trust fund doctrine created by the courts of equity can only apply to existing creditors. As stated in *Marvin* v. *Anderson,* creditors of the corporation are not presumed to have relied upon the property of their debtor which it did not possess when the indebtedness accrued, and so therefore, we think it clear that only existing creditors can complain.

XIII.

THE TRANSACTION BETWEEN THE BARNETTES AND THE RECEIVERS AMOUNTED TO AN ACCORD AND SATISFACTION, AND RELEASED THE DEFENDANTS AS JOINT-TORT-FEASORS OF BARNETTE.

Let us first review the facts in this connection:

On the 13th day of March, 1911, E. T. Barnette and Isabelle Barnette presented a petition to the judge of the court below, which we set forth in brief (p. 939):

> 1. That Barnette was, and for a long time past has been, the President of the Washington-Alaska

Bank; That said bank became involved in financial difficulties and was compelled to close its doors on the 3rd day of January, 1911. That at such time it was, and is now, unable to pay its depositors in full, and that its affairs are now in the hands of F. W. Hawkins and E. H. Mack, receivers.

2. That E. T. Barnette desires to become surety to the depositors of said Washington-Alaska Bank, and is possessed of real estate; that Isabelle Barnette, in consideration of love and affection for her husband E. T. Barnette, desires to aid her husband in "making payment to said depositors of said Washington-Alaska Bank," and is possessed of real estate and lands.

3. That said E. T. Barnette and Isabelle Barnette each desire to grant and convey unto the receivers said real estate and lands, to be held by the receivers as *security for the payment to said depositors of all sums of money which are now due, owing and payable to said depositors,* and to that end and for that purpose, do hereby deliver into court certain trust deeds of said real estate and lands, to be held by said receivers as security for payment in full to said depositors.

4. That they desire that the said receivers shall hold said real estate and lands in trust as security for payment to said depositors of all monies that shall be found due said depositors after the affairs of the Washington-Alaska Bank shall have been wound up and the assets of said bank realized upon and paid over to such persons; such trusteeship to continue until the 18th day of November, 1914; provided, that E. T. and Isabelle Barnette shall have failed to pay to said depositors any de-

ficiency that may be found to exist after winding up the affairs of said bank; it being the intention, desire and express wish of said petitioners, and each of them, and they agree and each of them do hereby promise and agree, to pay the said depositors in full not later than the said 18 day of November, 1914.

Then follow provisions in regard to the rents, issues and profits of said real estate, to the effect that the receivers shall collect the same, and, after deducting reasonable charges for collecting the same, taxes, etc., then "that the same be paid *pro rata* to said depositors," at such time and in such manner as the Court may direct.

It is then provided that if the petitioners and receivers deem it more advisable, after the delivery of said trust deeds, to sell and dispose of the lands situate in Alaska than to retain the same, that the same may be sold, and the proceeds disposed of, the same as the rents, issues and profits as above set forth.

Then follow representations as to the title, both as to the Alaska property and the Mexican property, to the effect that the same is all clear, except a certain option in favor of Ward and Beggs dated November 18, 1909, a copy of which was filed with the petition.

It then sets forth that certain legal proceedings are contemplated and about to be commenced against Barnette, which said legal proceedings would subject said real estate and lands (in Alaska)

(a) To the orders and processes of this court,

(b) Prevent your petitioners in any manner dealing in or with, or disposing thereof,

(c) Would entail great and unnecessary expense.

(Said litigation relating to Barnette's connection with the Washington-Alaska Bank.)

and that the petitioners desire to:

(a) Prevent the commencement of legal proceedings,

(b) And the incurring of said unnecessary and great expenses

(c) By surrendering all real estate and lands of said petitioners to the receivers, in trust.

(d) By paying all depositors of said Washington-Alaska Bank in full their respective deposits, with interest, not later than November 18, 1914.

The petitioners then pray that an order be made directing the receivers:

1: To accept and hold in trust the deeds to real estate and lands for the time and in the manner as herein provided.

2: To collect rents, etc., and disburse the same;

3: That if depositors are not paid in full, including interest by November 18, 1914, that the

receivers shall sell and dispose of all the real estate and property for the best price obtainable, and the proceeds be applied,

(a) In payment of depositors, with interest,

(b) Residue delivered to E. T. Barnette and Isabelle Barnette.

Trust deeds for property located in Alaska and in Mexico were presented with said petition.

On the 14th day of March, 1911, the said petition came on for hearing, and the Court, after hearing said petition, and "it appearing that it is a matter which should originate with the receivers," it is ordered "that said petition of E. T. Barnette and Isa-" belle Barnette, his wife, and the papers pertaining " thereto, be turned over to the receivers of the Wash-" ington-Alaska Bank for their consideration."

On the 20th day of March, 1911, there was filed with the clerk of this court, an "application of receivers for instructions," the same being dated March 20, 1911, wherein the receivers represent to the Court that "on the 18th day of March, 1911, E. T. Barnette " and Isabelle Barnette, his wife, delivered to us two " trust deeds, properly executed, wherein we are namd " as trustees of certain lands (mentioning them), *said* " *deeds being in trust on the terms and conditions* " *therein specified;* the object and purpose being as " therein expressed, to secure and ultimately pay the

" depositors and owners of unpaid drafts any balance " that may remain after the property and assets of " said bank are collected and applied in payment " thereof."

The receivers further say in said application: *"We " are of the opinion that if these deeds are accepted, " it will be* IMPRACTICABLE TO PROCEED AS CONTEM- " PLATED TO FIX THE LIABILITY AGAINST E. T. BAR- " NETTE, ONE OF THE GRANTORS, IN FAVOR OF THE " CREDITORS OF SAID BANK BY ACTIONS IN COURT HERE, " . . . In view of the *premises* we ask for the in- " structions and directions of the Court as to whether " we shall accept the said trust deeds and undertake " the duties and responsibilities entailed upon us " thereby, or return the same to the grantors thereof."

Said trust deeds were submitted with said application for instructions.

On the 29th day of March, 1911, the judge of the court made an order based on said "Application of receivers for instructions," directing said receivers to "accept said deeds" . . . and that said receivers take the proper and necessary steps and action to secure the same and the proceeds and issues therefrom to the payment of the liabilities of the Washington-Alaska Bank, in connection with their duties as receivers in the above entitled action.

The contents of the deeds that were presented with said "application for instructions" and which the re-

ceivers were directed by the order of the Court to accept may be digested as follows:

1. Bank suspended January 5, 1911, and at said time was, and now is, unable to pay in full all its depositors and other creditors the owners and holders of unpaid drafts; and that the property and assets of said bank are now in the hands of the receivers.

2. Barnette was the president and a director; that Isabelle Barnette "desirous to assist her husband in securing the payment of, and in paying and discharging, the obligations of her said husband to the depositors and holders of unpaid drafts."

3. Receivers are about to commence an action for and on behalf of *creditors* . . . against E. T. Barnette to recover from him the amount of any deficiency that may be ascertained as between the claims of the creditors above mentioned and the amount realized out of the property and the assets of said bank; said actions to be based on the liability of said E. T. Barnette to said creditors, arising out of his management of the affairs thereof.

Now, therefore, in consideration of the premises, viz.:

(1) Bank unable to pay depositors and holders of unpaid drafts.

(2) Desire of Mrs. Barnette to assist her husband in securing the payment of, and in paying and discharging the obligations of her husband.

(3) Receivers about to commence an action against E. T. Barnette to recover deficiency between claims of creditors and the amount realized out of the assets, on account of liability of E. T. Barnette arising out of his management from March, 1908, to January 4, 1911.

(4) Which said litigation, as appears from petition of E. T. Barnette and Isabelle Barnette, would subject the real estate and lands in Alaska,

(a) To orders and processes of this court,

(b) To prevent your petitioners in any way dealing in or with or disposing thereof.

(c) Would entail great and unnecessary expense.

and of the liability of said E. T. Barnette to the creditors of said Washington-Alaska Bank, growing out of his connection with the management of the business affairs thereof as President and one of the directors, and other good and sufficient considerations, said first parties do hereby grant and convey to the second parties in trust for the uses and purposes thereinafter specified, all the right, title and interest, etc., (describing the real estate and lands). To have and to hold . . . upon the following terms and conditions:

1. Whereas bank, on March 18, 1908, commenced to transact a general banking business, and operated bank until January 5, 1911.

2. During all of which time Barnette was President and a director, and as such was active

and influential in the control and management of its business affairs.

3. That on or about the 5th of January, 1911, bank became insolvent and receivers appointed.

4. That it has at all times since appeared, and now is apparent, that there is and will be a large deficiency as between the obligations of said bank to—

(a) Its depositors,

(b) Owners of unpaid drafts; On one side, and the Proceeds of its property and assets on the other.

5. That by reason of all of the premises, namely—

(a) Inability to pay depositors and holders of unpaid drafts,

(b) Receiver about to commence an action to recover deficiency between claims of creditors and the amounts realized out of assets on account of liability of Barnette to the creditors arising out of his management of bank.

(c) Insolvency of bank.

(d) That it is apparent that there will be a large deficiency between the obligations to depositors and holders of unpaid drafts and the amount realized from the property and assets.,

said E. T. Barnette heretofore assumed, and does now assume and take upon himself the obligations—

(a) To pay the depositors and owners of unpaid drafts and their representatives, any deficit

> that may hereafter be ascertained as between the amounts due to such depositors and owners of unpaid drafts from said banking institution on January 5, 1911, together with 6 per cent. interest thereon from January 5, 1911, *and the amount realized out of the property and assets of said bank and paid to such creditors.* That the amount of such deficiency is not known at this time, but will be ascertained on or before November 18, 1914.

(The clear interpretation of this language is that Barnette assumes to pay any deficiency between the amount due depositors and holders of unpaid drafts, and the amounts realized out of the property and assets of said bank and paid to such creditors by November 18, 1914.)

Said deeds then provide that the receivers take possession of the Alaska property, manage, control, etc., the same, return to the court the net amounts of the rents, issues and profits, and the same to be disbursed by the Court through its receivers *pro rata* to said depositors and holders of unpaid drafts; and also that if at any time after delivery of the deed, it is deemed advantageous by all of the parties, that the Alaska property be sold. The receivers may sell the same, and the proceeds may be disbursed by the Court *pro rata* to the depositors and owners of unpaid drafts.

> It is then provided, But that if on November 18, 1914, demands of depositors and owners of

unpaid drafts, with interest, have not been fully paid and satisfied, either—

1: Out of the property and assets of said bank as administered by the receivers,

2: Or otherwise,

3: Or by E. T. Barnette.

The Receivers

(1) may and are hereby empowered to sell (the same) at private sale, the whole or part of the real estate then unsold, upon the best terms that they may be able to secure,

(2) make proper conveyances therefor,

(3) receive the purchase price and turn the same into court and pay out so much thereof as may be needed to fully liquidate and pay *any balance that may remain unpaid of the claims and demands of the depositors and owners of unpaid drafts.*

said money to be disposed of by order of the court; If there be more of the purchase money than is required to pay and discharge the said balance due to the depositors and owners of unpaid drafts . . . overplus shall be returned to party of first part

Covenants of title.

And the statement that if, at any time, after delivery of deeds, the demands of depositors and owners of drafts shall be satisfied in full, the receivers shall re-convey said property to E. T. and Isabelle Barnette.

It is then provided that it is understood and agreed that if after—

1: Applying the proceeds of the property and assets of said Washington-Alaska Bank,

2: the amount collected by receiver from George Edgar Ward and W. B. Beggs, if any,

3: and the proceeds of the sale of property situate in Alaska,

4: and the amounts collected and received, if any, by receivers from the rents, issues and sales of the real property conveyed by the trust deeds.

there should remain a balance yet due depositors and owners of unpaid drafts, then the first parties hereby . . . promise and agree to make good such balance or deficiency and pay same to second parties on demand.

The provisions of the deeds for the Alaska property and the Mexican property are practically the same, with the exception that as to the Alaska property the receivers were to take immediate possession, but were not to take possession of the Mexican property until November 18, 1914.

The receivers, after said order of Court, accepted the delivery of said trust deeds and took possession of the property situate in the Fairbanks Recording District, Alaska, and since said time have received the rents, royalties and issues derived therefrom, and in one instance, with the consent of Barnette, sold some property on Second Avenue in the town of

Fairbanks, Alaska, for which they received the sum of $2500 (p. 1011).

The net amount realized from the rents, issues, profits and sale of said property up to May 1, 1914, netted the sum of $30,905.65 (p. 963).

The evidence undisputed shows the value of the Barnette property situate on Turner Street, is between $20,000 and $25,000 (pp. 1009, 1010), that the Barnette home is of the value of $3500 (p. 1009); showing that it may safely be assumed that the town property is worth the sum of $25,000.

The evidence shows that the interests of the receivers, under the trust deed, in the mining property situate on Dome and Vault Creeks, is of the value of $20,000 (p. 1018).

The present value of the Mexican property is unknown, but, at the time of the execution of the trust deeds, was of the value of $500,000 (p. 959).

Our contention is:

1. That the acceptance of the deeds of trust by the receivers under order of the Court, upon the terms therein mentioned constituted a complete accord and satisfaction of all the liability of the said E. T. Barnette to the creditors of said Washington-Alaska Bank, and thereby operated as a satisfaction and extinguishment of the original causes of action against E. T. Barnette;

thereby releasing all persons jointly liable with him.

2. That if said acts,—and the delivery of said trust deeds, and the acceptance of the same by the receivers, did not operate as an accord and satisfaction, that it was as to him at least, a covenant not to sue, and as such operated to extinguish the original causes of action to the amount of the value of the money and property received thereby.

3. That the same constituted the compromise of a tort; the same being disputed by the said E. T. Barnette, the amount for which he was liable and the certainty of his liability being questionable.

It is, of course, well settled that an accord and satisfaction by one joint-tort-feasor, operates as a release of all.

The rule is thus stated in 1 *Ruling Case Law*, page 201:

> "The general rule that the discharge of one joint debtor discharges his co-joint debtors is applicable to a discharge of one joint debtor by way of accord and satisfaction. So as a general rule, an accord and satisfaction between a person injured and one of several co-tortfeasors responsible therefor will discharge the others from further liability to the person injured."

This accord and satisfaction may be effected by the substitution of a new obligation notwithstanding the latter is executory.

In a leading case, the Supreme Court of Iowa said:

> "The common law declares that, without a satisfaction, an accord is no bar to a suit upon the original obligation. If, however, the accord is founded upon a new consideration, and accepted as satisfaction, it operates as such satisfaction, and will be held to take away the remedy upon the old contract. This we believe to be in accordance with the current of authorities, and is certainly in harmony with the analogies and equities of the law. *Story Cont.*, Sec. 982; *Pars. Cont.*, 194 *et seq.* Whether there has been a new consideration in legal contemplation, and particularly whether the accord or (new) agreement was accepted as satisfaction, depends upon the circumstances of each case; and in determining its tenor and effect, we must, from the circumstances, endeavor to ascertain the intention of the parties. For while some authors and some of the cases speak of the unexecuted promise being satisfaction in those cases only where it is made so by express agreement, we suppose that ordinarily no rule is violated in holding that it is sufficient, if this intention or purpose is evidenced by any unequivocal act, or in any clear manner. It was said in examining a somewhat similar proposition in *Levi* v. *Karrick*, 13 Iowa, 344: 'The question is one of evidence or contract, and whether . . . established by necessary implication, or from express stipulation, the rule is the same.' "

Hall v. *Smith*, 15 Iowa, 583.

While it is a general rule that an accord, in order to operate as a discharge of the debt, must be executed, yet it is equally well established that where the creditor accepts the mere promise of the debtor to perform some acts in the future in satisfaction of the debt, the mere promise itself without satisfaction is sufficient to extinguish the debt:

Smith v. *Elrod,* 122 Ala., 269, 24 South., 994;
Price v. *Price,* 111 Ky., 771, 64 S. W., 746; 66 S. W., 529;
Gowing v. *Thomas,* 67 N. H., 399, 40 Atl., 184;
Billings v. *Vanderbeck,* 23 Barb., 546;
Nassoiy v. *Tomlinson,* 148 N. Y., 326, 51 Am. St. Rep., 695, 42 N. E., 715.

The same rule is substantially asserted in

Guldagar v. *Rockwell,* 14 Colo., 459, 24 Pac., 556;
Goodrich v. *Stanley,* 24 Conn., 613;
Sanford v. *Abrams,* 24 Fla., 181, 2 South., 273;
Brunswick, etc. R. R. Co. v. *Clem,* 80 Ga., 534, 7 S. E., 84;
Knowles v. *Knowles,* 128 Ill., 110, 21 N. E., 196;
Moon v. *Martin,* 122 Ind., 211, 23 N. E., 668;
Potts v. *Polk County,* 80 Iowa, 401, 45 N. W., 775;
Peace v. *Stennet,* 4 J. J. Marsh, 450;

White v. *Gray,* 68 Me., 579;
Yazoo, etc. R. R. Co. v. *Fulton,* 71 Miss., 385, 14 South., 271;
Todd v. *Terry,* 26 Mo. App., 598;
Frick v. *Joseph,* 2 N. Mex., 138;
Oregon, etc. R. R. Co. v. *Forrest,* 128 N. Y., 83, 28 N. E., 137;
Christie v. *Craige,* 20 Pa. St., 430;
Gulf, etc. R. v. *Harriett,* 80 Tex., 73, 15 S. W., 556;
Babcock v. *Hawkins,* 23 Vt., 561.

There may be a complete accord and satisfaction notwithstanding that there has not been complete performance.

In *Hosler* v. *Hursh,* 151 Pa. St., 415, 25 Atl., 52, Mr. Justice Sterrett says:

> "It is no doubt true as was held in *Babcock* v. *Hawkins,* 23 Vt., 561, cited by the learned president of the common pleas, that where the accord is founded upon a new consideration and is accepted as satisfaction, it operates as such, and bars the remedy on the old contract. There is an obvious distinction between an engagement to accept a promise in satisfaction and an agreement requiring performance of the promise. *If the promise itself and not its performance is accepted in satisfaction* this is a good accord and satisfaction without performance."

This doctrine is approved in

Laughead v. *Frick Coke Co.,* 103 Am. St. Rep., 1017.

The law bearing upon this issue is very clearly stated in *Chitty on Contracts:*

> "Upon the whole, the true distinction would seem to be between the cases in which the plaintiff has agreed to accept the promise of the defendant in satisfaction, and those in which he has agreed to accept the performance of such promise in satisfaction; the rule being that, in the latter case, there shall be no satisfaction without performance, while in the former, if the promise be not performed, the plaintiff's only remedy is by action for the breach thereof, and he has no right to recur to the original demand."

Gulf C. & S. F. Ry. Co. v. *Harriett,* 15 S. W., 557.

WHETHER IT IS THE NEW PROMISE OR THE PERFORMANCE THEREOF WHICH IS TO CONSTITUTE SATISFACTION DEPENDS ENTIRELY UPON THE INTENTION OF THE PARTIES.

Mr. Parsons says, that a promise without execution is no satisfaction unless by express agreement it had this effect. And again, it is said that the promisee may sue on the original cause of action, unless by the tenor or the legal effect of the new contract,

the new promise is itself a satisfaction and an extinction of the old one.

2 *Parsons on Cont.,* 194, 196, 199, note s.

"It," says Redfield, J., in *Babcock* v. *Hawkins,* 23 Ver., 561, "is ordinarily a question of inten-" tion, and should be evidenced by some express " agreement to that effect, or by some unequivocal act " evidencing such a purpose." In that case this intent was shown by executing a receipt in full to settle all book accounts to that date, including that sued on. So in arriving at the intention courts will ascertain whether the second agreement is founded upon a new consideration, whether the promisee has surrendered or retained the evidence upon which to maintain his former remedy, whether any securities have been given up, whether a release or receipt has been executed, whether the new contract is of a higher grade than the old. These and similar considerations are to have weight in determining the intention of the parties.

Hall v. *Smith et al.,* 10 Ia., 49;
Walker v. *Metcalf,* 58 Atl., 687.

Whether an accord or new agreement has been accepted as satisfaction depends upon the circum-

stances of each case, and must be ascertained from the intention of the parties as evidenced by their acts.

Hall v. *Smith,* 10 Ia., 45, 45 Iowa, 588;
Curtis v. *Browne,* 63 Mo. App., 438;
Worden v. *Houston,* 92 Mo. App., 371;
Frick v. *Joseph,* 2 N. Mex., 138;
McCreery v. *Day,* 119 N. Y., 5, 23 N. E. Rep., 198;
Laughead v. *H. C. Frick Coke Co.,* 209 Pa. St., 368, 58 Atl. Rep., 685;
Evans v. *Powis,* 1 Exch., 601;
Bullen v. *McGillicuddy,* 2 Dana (Ky.), 90;
Hart v. *Boller,* 15 S. & R. (Pa.), 162;
Gulf, etc. Ry. Co. v. *Harriett,* 80 Tex., 73, 15 S. W. Rep., 556;
Note to *Manley* v. *Vermont Mut. Fire Ins. Co.,* 6 A. & E. Ann. Cas., 563.

We must therefore examine the facts surrounding this transaction to arrive at the intention of the parties.

When this arrangement was carried into effect what was the situation of the parties? Could the receivers have receded from their position and sued Barnette on the original cause of action? Or were they estopped so to do? Was the transaction binding on Isabelle Barnette? If so, there must have been a consideration moving to her.

If there was no consideration for the execution

of these deeds the Barnettes are entitled to set the transfers aside.

If there was a consideration, what was that consideration? Plainly it was a forbearance on the part of the receivers to bring suit against Barnette. Whether there was such an agreement on the part of the receivers not to bring suit, must be ascertained from the circumstances of the transaction.

The following facts are apparent: 1st, that the receivers did not bring suit; 2nd, that in their petition to the Court they stated that it would be impracticable for them to bring suit if they accepted the deeds; 3rd, in their reply they expressly set up a promise not to sue.

Therefore, in consideration of their promise not to sue Barnette they secured these trust deeds containing not only property of Barnette which they could have subjected possibly to execution, but property of Isabelle Barnette, who was a stranger to the entire proceeding.

If this new promise which Barnette made and in which his wife joined, to pay the amounts due the depositors and draft holders, supported by the conveyance of their properties, was founded upon a valid consideration, then there was a complete accord and satisfaction.

The promise not to sue which was the consideration

for the deeds appears from the reply of the receiver in the following words:

> "As to whether or not the former receivers, after the delivery of said trust deeds, abandoned all idea of instituting a suit against said Barnette or any other director of said bank, this plaintiff has neither knowledge nor information sufficient to form a belief. He admits that no suit was instituted by them, as stated, and that no suit was instituted against said directors until after the appointment of the present receiver, this plaintiff. He alleges that in the institution and prosecution of this suit he is acting under order of court; he admits that the said Barnette was not joined as a party defendant in this action, and he alleges that the reason therefor is that *the acceptance of said trust deeds operated as an agreement not to sue said Barnette prior to November 18, 1914*" (p. 186).

An agreement not to sue. On what? On November 18, 1914, the receiver would have the right under the terms of the trust deeds to sue Barnette on his express written promise

> "to pay the depositors and owners of unpaid drafts of the said banking institution . . . any deficit that may be ascertained . . . by or before Nov. 18, 1914" (p. 1043).

The right to sue for the original tort was gone.

The word *"impracticable"* is thus defined by the Standard Dictionary:—"incapable of being affected "from lack of adequate means; impossible of per- "formance; not feasible; impossible; that which is

" impossible cannot be done at all; that which is im-
" practicable is theoretically impossible and cannot be
" done under existing conditions."

When the receivers stated to the Court that it would be impracticable to bring suit if they accepted the trust deeds, they meant it would be impossible for them to do so. Because they considered that the acceptance of the deeds of trust by them precluded any further action by them on account of the original torts.

They evidently regarded the transaction as accord and satisfaction so far as Barnette was concerned.

It is frequently stated that a covenant not to sue one tort-feasor, is no bar to an action against the other tort-feasors. This doctrine is undoubtedly sound, but the covenant not to sue, or the promise not to sue, may be the consideration for a new agreement by one of the tort-feasors, which agreement operating as a substitution for his original liability constitutes an accord, and where the understanding is that the promise embodied in the new agreement by the tort-feasor, and not the performance of the promise is intended as a satisfaction, then the accord and satisfaction is complete, and the other tort-feasors are released. The whole matter turns upon the question of whether the transaction between the Barnettes and the receivers was such that in any future event Barnette could have been sued by the receivers on the original causes of action. Suppose Barnette had

been made a party defendant to this action, his defense would have been: "I have compromised my "liability, have entered into a written agreement to "pay the amount for which I am liable, have con- "veyed property to the receivers in support of my "promise, and have caused my wife to join me in "this contract, and to add her property to mine as "security for its performance; there has been a "novation as between the receivers and myself. I "did this to avoid this very suit." This would have been a complete defense on Barnette's part, had he been made a defendant in this action. There can be no question about that.

Now the receiver admits that there was an agreement on his part not to sue Barnette. The significance of this so-called covenant not to sue, lies in the admission that there was a definite promise of forebearance to sue on the part of the receiver. The significance of this promise lies in the fact that it furnished the consideration for the engagements on the part of Barnette and his wife, and for the conveyance of their property, particularly that of Mrs. Barnette, and thereby placed them in such a position that they could not recede from their contract on the ground of want of consideration. They being thus bound under the new contract, and having no right to avoid it, the novation is complete, and this novation operated a complete accord and satisfaction.

XIV.

THE TRANSFER OF ASSETS TO THE PLAINTIFF BY BARNETTE WAS PRO TANTO A SATISFACTION OF ANY CLAIM BY THE RECEIVER AGAINST HIS JOINT-TORTFEASORS, AND THE PROPERTY SO TRANSFERRED BEING IN EXCESS OF THE AMOUNTS FOUND TO BE DUE FROM ANY OF THE DEFENDANTS, THEY HAVE BEEN THEREBY COMPLETELY DISCHARGED.

These defendants, if liable at all, were liable jointly with E. T. Barnette, who was their co-director at the time of the commission of all the torts complained of. His liability and responsibility for these acts was admitted in writing by him (pp. 1029-1032). To secure the depositors and creditors against loss and prevent litigation against himself, he and his wife executed deeds of trust to the receivers, which covered properties in Alaska consisting of town property and mining properties, and property in Mexico consisting of a large plantation, together in excess of the value of $600,000. The receivers went into immediate possession of the Alaska properties and realized from them more than enough to have satisfied the claims against these defendants (p. 953). They collected the sum of $30,905.65 in cash, which was in the present receiver's hands at the time of the trial. He was also in possession under the Barnette deed of property in Fairbanks which the undisputed testimony shows was worth $20,000 at least (pp. 1009, 1010).

So that without counting the mining properties or the Mexican, the receiver had in his possession at the time of the trial over $50,000 worth of property which he was entitled to apply in partial satisfaction of Barnette's liability.

That being the case the defendants were likewise entitled to the benefit of the application *pro tanto* to the claims for which they were jointly liable with Barnette, and the claims against them being smaller than the amounts paid by their joint-tort-feasor they have been in effect fully satisfied.

The avowed purpose of these conveyances to the receivers was to put them into possession of assets sufficient to pay off all of the indebtedness of the bank.

Can one tort-feasor compromise the tort by agreement to pay the damage in full, convey to the injured party property ample for the purpose, and at the same time leave it so that the party injured can bring his action against the co-tort-feasor as if the compromise had never been effected?

The rule is, of course, well settled that the release of one joint-tort-feasor operates as a release of all of them. It is likewise also well settled that a partial satisfaction of the claim by one joint-tort-feasor operates as a satisfaction *pro tanto* as to all the others. Satisfaction does not require that there should be an actual or formal release. It is sufficient if the injured party accepts something from one of the tort-feasors in lieu of his claim against such tort-feasor;

this amounts to a settlement, satisfaction and release of such tort-feasor, and the other joint-tort-feasors are then released thereby. This release may take place by means of an accord and satisfaction, and this accord and satisfaction may be likewise by way of a novation.

The plaintiff had originally certain claims against E. T. Barnette and various of the defendants here. These claims did not all arise out of the same transaction. There was a joint liability between Barnette, McGinn, Wood, Brumbaugh and Jesson, growing out of the declaration of a dividend; there was a joint liability between Barnette and Jesson, growing out of certain surrenders of stock; there was a joint liability between Barnette, Jesson and Hill, growing out of certain other releases of stock, and so on. Barnette and Jesson were the only ones who had a common liability with all the defendants for all of the injuries complained of in this case. Anything which the plaintiff did which operated to release Barnette in whole or in part, to that extent released the defendants herein.

Barnette in whole or partial settlement of his liabilities to the plaintiff, growing in part out of the transactions herein complained of, has transferred to the plaintiff property far in excess in value of the amount for which these defendants, or any of them, have been found liable. Admitting for the sake of argument that Barnette has not by these transactions

been totally released from his liabilities, and likewise admitting for the sake of argument that the new obligation assumed by him was not intended as a substitution for the original liability, the fact, nevertheless, appears that by means of money and property, which he has transferred to the plaintiff, he has reduced his liability to some extent. The defendants are entitled to the benefit of this settlement to the same extent; and it appearing that the property so transferred is of greater value than the amount for which they have been found liable, they are thereby fully released.

To illustrate, let us assume that four persons have committed a trespass upon a fifth, who instead of bringing a single action against the four jointly, brings four actions, one against each one. In one action he recovers a judgment of $100.00 against A; in another $500.00 against B; in the third $1000.00 against C, and in the fourth $5000.00 against D. Under the law he is at liberty to proceed by execution under any one of these judgments. If he proceeds under the $100.00 judgment and satisfies it, he satisfies all the others. If he proceeds under the $500.00 judgment and satisfies it, he satisfies all of the others. Suppose, however, that he proceeds under the $5000.00 judgment and realizes under execution $750.00, which he applies upon the judgment, the judgments against A and B are satisfied in full; against C as to all, except $250.00, while D still owes him $4250.00.

Chief Justice Kent in *Livingston* v. *Bishop,* 1 Johnson, 290, 3 Am. Decs., 330, said:

> "It is, however, a proposotion that is not controverted, but everywhere admitted, that for a joint trespass, the plaintiff may sue all the trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from this doctrine that a trial and recovery against one trespasser is no bar to a trial and recovery against another. If there can be but one recovery, it is vain to say that the plaintiff may bring separate suits, for the cause that happens to be first tried, may be used by way of *puis darrein* continuance, to defeat the other actions that are in arrear. The more rational rule appears to be, that where you elect to bring separate actions for a joint trespass, you may have separate recoveries, and but one satisfaction; and that the plaintiff may elect *de melioribus damnis,* and issue his execution accordingly."

Ellis v. *Esson,* 36 Am. Rep., 834, is a leading case. In that case the Court said:

> "It is insisted by the counsel for the respondent that when the contract which is set up as a release of one of several joint wrongdoers is not a technical release, the construction of which is fixed by the law, then the intention of the parties is to govern; and if it be clear that there was no intention on the part of the injured person to release his cause of action against all the wrong-doers, and that the sum received was not in fact a full compensation for his injury, nor intended to be such by the parties, then any agreement of the injured party not to prosecute one or more of several wrong-doers, in consideration of the payment of a

specified sum of money, does not discharge the other wrong-doers, *except to the extent of the money so received.* In other words, when the contract is not of such a nature that the law deems it conclusive evidence that the injured person has been satisfied for the wrong, then it becomes a question of fact for the court or jury whether what he has received of the one wrong-doer was received in full satisfaction of his wrong; and if it appears that it was not so received, it is only *pro tanto* a bar to an action against the other wrong-doers. And this view of the case, we think, is sustained by the great weight of authority *in all cases where the amount of the damages is the subject of proof and computation,* as in this case, though there is some conflict in those cases where the damages are not the subject of proof and computation, but rest mostly in the discretion of the jury, as in cases of assault and battery, slander, libel, false imprisonment and other actions of that nature."

In *Ellis* v. *Bitzer,* 2 Oh., 89, 15 Am. Dec., 537, it was said:

"An accord and satisfaction of a joint trespass by one is good for all concerned. The act of one of several joint trespassers is the act of all; they all unite to do an unlawful act, and each is responsible for the acts of the others. The plaintiff may elect to sue them jointly or separately, and may pursue them until he has obtained satisfaction, but he can have but one recompense in damages for the same injury. The plaintiff here agreed to take the note of Williams and Adkins, two of the trespassers, for one hundred and fifty dollars, and to forbear to sue them; the note was given, and it was understood they were fully discharged, and

he has thus made his election, not only as to the amount he would receive as a recompense for the injury he sustained from the assault and battery committed by the defendants jointly with Williams and Adkins, *but also of the persons from whom he would recover that recompense.* He has been satisfied for the trespass committed upon him, and to permit him to recover in this action would give him another recompense for an injury already satisfied."

In the case of *Snow* v. *Chandler,* 10 N. H., 92, 34 Am. Dec., 141, the Court said:

"No release of damages was here given; and the only question is, whether the sum paid was in satisfaction of the damage incurred. If it was not so received, it is clear that the claim is not discharged. . . .

"It is clear that the sum paid was not received in satisfaction of the damage, but only in part satisfaction; and the fact that it was coupled with the engagement not to sue Holt does not alter the case. It is still but a partial satisfaction of the damage, and the plaintiff may sue or omit to suit whom he pleases, by contract or otherwise. The other trespasser has no equitable or legal claim to prevent such an arrangement. He remains liable for the whole damage until satisfaction is made.

"If the individual receiving the injury sees fit to visit the penalty upon any one guilty individual rather than another, such individual has no right to complain. It is part of the necessary liability that he incurs in committing the trespass, and should serve to deter him from such wrongful acts. *At the same time, any partial payment by a co-trespasser avails so far for his benefit."*

Where, upon a settlement with one tort-feasor, plaintiff expressly reserves his cause of action against the other, if he has not been fully satisfied for the wrong done him, the wrong-doers can insist that whatever their co-trespassers have done towards *payment of the damages shall apply pro tanto,* and they are liable for the balance.

Chamberlin v. *Murphy,* 41 Vt., 110.

When the plaintiff has accepted satisfaction in full for the injury suffered by him, the law will not permit him to recover again for the same injury; but he is not so affected until he has received full satisfaction, or that which the law considers such. If he receives part of the damages from one of the wrong-doers, the receipt thereof not being understood to be in full satisfaction of the injury, he does not thereby discharge the others from liability:

Boyles v. *Knight,* 123 Ala., 289, 26 South., 939;
Heimaman v. *Kinnare,* 92 Ill. App., 232;
McGrillis v. *Hawes,* 38 Me., 566;
Irvine v. *Mulbank,* 15 Abb. Pr. (N. S.), 378;
Bloss v. *Plymale,* 3 W. Va., 393, 100 Am. Dec., 752;
Ellis v. *Esson,* 50 Wis., 138, 36 Am. Rep., 830, 6 N. W., 518.

Such partial satisfaction operates only as a satisfaction pro tanto in favor of the rest of the tort-

feasors. Thus far, however, they may show it in mitigation of damages, and they can be made to respond only for the balance:

Smith v. *Gayle,* 58 Ala., 600;
Meixell v. *Kirkpatrick,* 29 Kan., 679, 684;
Snow v. *Chandler,* 10 N. H., 92, 34 Am. Dec., 140;
Merchants Bank v. *Curtis,* 37 Barb., 317;
Knapp v. *Roche,* 94 N. Y., 329;
Heyer Bros. v. *Carr,* 6 R. I., 45;
Chamberlin v. *Murphy,* 41 Vt., 110.

For example, when a portion of property wrongfully taken is returned and accepted, there is a reduction *pro tanto* from the total damages that otherwise would be allowed:

Bowman v. *Davis,* 13 Colo., 297, 22 Pac., 507.

And where one is injured in a collision between the cars of a railroad and a street-car company, and the latter pays him five hundred dollars, in addition to compensating him for lost time, paying his doctor's bill, and the like, he is not precluded from recovering from the railroad company, provided he has executed no release, *though the amount received must be applied in reduction of his recovery.*

Chicago, etc. R. R. Co. v. *Hines,* 82 Ill. App., 488.

When an injured party has voluntarily received satisfaction, or partial satisfaction, for the injury from one tort-feasor, he cannot recover the same again from the others who aided in committing the wrong.

> "It is to be observed, in respect to the point above considered, where the bar accrues in favor of some of the wrong-doers by reason of what has been received from, or done in respect to, one or more others, that the bar arises, not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar as to all."

Cooley Torts (2d Ed.), 160, and note;
Brown v. *City,* 3 Allen, 474.

The "bar" mentioned by Judge Cooley includes a deduction from the total damages, that would otherwise be allowed, of the value, when property wrongfully taken has been returned; and the rule, of course, applies *pro tanto* when a portion only has been tendered back to plaintiff prior to suit, and voluntarily received by him.

Knapp v. *Roche,* 94 N. Y., 329;
Sloan v. *Herrick,* 49 Vt., 327;
Ellis v. *Esson,* 50 Wis., 138, 6 N. W. Rep., 518.

A case directly in point is *Miller* v. *Fenton,* 11 Paige, 20, where the receiver of a bank agreed to release and discharge an officer from all liability incurred by reason of fraudulent transactions, in consideration of the transfer of certain property, but without prejudice to a claim for the same fraud against another, and the Court held that, as the release was not a technical one under seal, therefore it was not a bar to an action against the other wrongdoer, and all that could be claimed would be to have *the actual value of the property which was transferred to the receiver applied in reduction of the amount chargeable* against the defendants jointly on account of their fraud.

In a note in 58 L. R. A., 431, the writer after reviewing a vast number of cases draws the following conclusion:

> "The American rule, sustained by the great weight of authority, is that nothing short of full satisfaction or its equivalent can make good a plea of former judgment in tort, offered as a bar in an action against another joint-tort-feasor who was not a party to the first judgment.
>
> "While the grounds of the decisions under the English cases offer equitable and convincing reasons for their course, viz: The liability of tort-feasors for a joint tort is joint and several. The injured party has the right to pursue them jointly or severally at his election, and recover separate judgments; but, the injury being single, he may recover but one compensation. Therefore, he may elect *de melioribus damnis* and issue his execu-

tion accordingly, but if he obtains only partial satisfaction he has not precluded himself from proceeding against another co-tort-feasor; his election of the first judgment concluding him only as to the amount he may receive, and *whatever has been paid must apply pro tanto upon his further recovery.*"

It is respectfully submitted that for the foregoing reasons the judgment should be reversed.

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